

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

April Term 1955

1955

No. 12,879
1547-52

Joseph W. Stewart
CLERK

(See also Misc. 561)

CHARLES W. DOUGLAS, ... APPELLANT,

vs.

THE UNITED STATES OF AMERICA, ... APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES DISTRICT COURT
For the District of Columbia
HOLDING A CRIMINAL TERM
-----~~Term~~-----

(1)
FILED IN OPEN COURT
OCT 6 - 1952
HARRY M. HULL, Clerk

Grand Jury Impanelled September 2, 1952, Sworn in September 3, 1952

THE UNITED STATES OF AMERICA	)	Criminal No. 1547-52
vs.	)	Grand Jury No. Orig.
Charles W. Douglas	)	Robbery (22-2901 D. C. Code)

The Grand Jury charges:

On or about September 11, 1952, within the District of Columbia, Charles W. Douglas by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Leo McGreevy property of Khoren H. Aslanian of the value of about \$9.00 consisting of the following: nine dollars in money.

A TRUE BILL:

/s/ Nathan Poole
Foreman.

/s/ Charles M. Irelan
Attorney of the United States in
and for the District of Columbia

UNITED STATES

vs.

Charles W. Douglas

Defendant

Criminal No. 1547-52

Charge Robbery

(2)
FILED
OCT 14 1952

HARRY M. HULL, Clerk

PLEA OF DEFENDANT

On this 10th day of October 1952, ~~1949~~, the defendant Charles W. Douglas, appearing in proper person and ~~by his attorney~~ without counsel, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of

/s/ JAMES R. KIRKLAND

Presiding Judge

Criminal Court # 3

FILED

(3)

DEC 19 1952

HARRY M. HULL, Clerk

On this 19th day of December, 1952, came the attorney of the United States; the respondent in proper person and by his attorney Charles Hailer, Esquire; whereupon the Court directs that a jury be empaneled to determine whether or not the respondent is of sound or unsound mind; and thereupon the jurors of the regular Petit Jury panel serving in Criminal Court No. Civil, being called, are sworn upon their voir dire; and now comes a jury of good and lawful persons of the District of Columbia, to-wit:

- | | |
|-------------------------|---------------------------|
| 1. James F. Burke | 7. John J. McCabe |
| 2. Andrew L. Clark | 8. Lee G. McClendon |
| 3. Catherine E. Elliott | 9. Rosina M. Murphy |
| 4. James G. Ferguson | 10. Bernard C. Nicholson |
| 5. Alma M. Lindo | 11. Edward Niederstrasser |
| 6. Dorothy C. Logan | 12. Bernard J. Parker |

who are sworn to well and truly ascertain whether or not the respondent is of sound or unsound mind, upon their oath say that the respondent is of unsound mind.

It is ordered that the clerk certify a copy of this verdict and this order to the Administrator, Federal Security Agency. The respondent is remanded to the District Jail to await the order of the said administrator for his, the said respondent's transfer, to St. Elizabeth's Hospital.

By direction of

/s/ BOLITHA J. LAWS

Presiding Judge

Criminal Court #ASSIGN.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SAINT ELIZABETHS HOSPITAL
WASHINGTON 20, D. C.

(4)
68,455

1547-52

Re: Charles W. Douglas
July 20, 1954.

FILED

JUL 28 1954

HARRY M. HULL, Clerk

Clerk, Criminal Division
U. S. District Court for the
District of Columbia
Washington 1, D. C.

I, Winfred Overholser, M. D., Superintendent of Saint Elizabeths Hospital, Washington, D. C., hereby certify that Charles W. Douglas was received in

said Hospital for treatment of mental disorder on January 16, 1953, (4)
having been found of unsound mind by Jury December 19, 1952, under Criminal
numbers 1545, 1546 and 1547-52, and committed by the United States District
Court for the District of Columbia.

I further certify that the said Charles W. Douglas has recovered his
reason and that he is now of sound mind and was discharged from treatment in
said Hospital, July 20, 1954.

/s/ Winfred Overholser
Winfred Overholser, M.D.,
Superintendent

UNITED STATES

vs.

Charles W. Douglas
Defendant

(5)
Criminal No. 1547-52 FILED
Charge Robbery FEB 23 1955
HARRY M. HULL, Clerk

WITHDRAWAL OF PLEA

On this 23rd day of February, 1955, the defendant Charles W. Douglas,
appearing in proper person and by his attorneys Harry Ahern and John Diamond,
in open Court withdraws his plea of not guilty to the indictment heretofore
entered and pleads guilty.

The case is referred to the Probation Officer of the Court and the
defendant is remanded to the District of Columbia Jail.

By direction of
/s/ Edward M. Curran
Presiding Judge
Criminal Court #3

UNITED STATES

vs.

Charles W. Douglas
Defendant

(6)
Criminal No. 1547-52 FILED
Charge Robbery MAR 25 1955
HARRY M. HULL, Clerk

WITHDRAWAL OF PLEA

On this 25 day of March, 1955, the defendant Charles W. Douglas, appear-
ing in proper person and by his attorney John B. Diamond III, in open Court
withdraws his plea of ~~not~~ guilty to the indictment heretofore entered and
pleads ~~guilty~~ not guilty.

The defendant is remanded to the District of Columbia Jail.

By direction of
/s/ Edward M. Curran
Presiding Judge
Criminal Court #3

UNITED STATES

vs.

Charles W. Douglas

Defendant

Criminal No. 1547-52

Charge Robbery

(7)

FILED

MAY 24 1955

HARRY M. HULL, Clerk

On this 24th day of May, 1955, came again the parties aforesaid, in manner as aforesaid, the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon, the alternate jurors are discharged; thereupon, the jury upon their oath say that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of

/s/ Luther W. Youngdahl

Presiding Judge

Criminal Court #One

Judgment and Commitment (Rev. 7-52)

Cr. Form No. 25 (8)

UNITED STATES DISTRICT COURT

For The

DISTRICT OF COLUMBIA

FILED

JUN 16 1955

HARRY M. HULL, Clerk

UNITED STATES OF AMERICA

v.

Criminal No. 1547-52

Charles W. Douglas

On this 16th day of June, 1955 came the attorney for the government and the defendant appeared in person and¹ by counsel, Harry Ahern, Esquire

It Is Adjudged that the defendant has been convicted upon his plea of² not guilty and a verdict of guilty of the offense of

Robbery

as charged³

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴

Eighteen (18) months to Seven (7) years; said sentence to take effect at the expiration of the sentence now being served.

~~XXXXXXXXXXXX~~

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl

United States District Judge.

FOR THE DISTRICT OF COLUMBIA

-----X
UNITED STATES OF AMERICA

v.

Criminal No. 1547-52

CHARLES W. DOUGLAS,

Defendant.
-----X

Washington, D. C.,

Monday, May 23, 1955.

Trial in the above-entitled cause commenced at 10:45 a. m., before
Honorable Luther W. Youngdahl, United States District Judge, and a Jury.

APPEARANCES:

For the Government:

Harold Titus.

For the Defendant:

Harry Ahern, Jr.

LEO MCGREY

(17)

was called as a witness by and on behalf of the Government, and, being
first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

First tell us your name and your present address.

(18)

A Leo McGrevy, 26 20th Street Northwest.

Q And where are you employed, Mr. McGrevy?

A Well, right now I am unemployed.

Q Prior to--rather, in 1952, around the month of September, where
were you employed at that time?

A At the Court Hotel, 410 - 6th Street Northwest.

Q Court Hotel?

A Yes, sir.

Q And what was your job at the Court Hotel, Mr. McGrevy?

A Well, I was sort of night manager and took care of the desk.

Q Directing your attention specifically to the morning of September
11th, the early morning of September 11th, 1952, did there come an occasion
when an unusual incident occurred to you?

A Yes, sir.

Q Tell us in your own words what occurred.

A Just from the beginning of the incident? (18)

Q Right from when it started; that is right.

A Well, to the best of my memory, I will try to tell it as it just happened, I was in the parlor, which is right off the desk to the door there, and it was a little more comfortable in there and nicer seats, so I (19) would sit in there at that time of the morning and keep an eye on the desk and on the front entrance, and about the time we mentioned, about three o'clock somewhere, after, or so--

Q Now, Mr. McGrevy, don't let your voice drop down. Hold your voice up.

A Well, around about that time I heard the door open so I came to the door of the parlor and stuck my head out and a young man coming in, neatly dressed, said "Have you any rooms?" I said, "I think so."

And I walked over to the desk and looked at the chart that I had right there on the desk showing the rooms vacant, for rent; I mentioned several rooms we had and I think I asked him if he wanted a single or a double, and by this time he walked around the desk and while I was looking at the chart he stuck a little snub-nosed revolver right in my side here, right above the stomach, about in here (indicating) and he says "I want all your money."

I don't remember whether he said "This is a stickup" or not, but he said "Give me your money, all your money, or I will kill you."

Well, I said, "I haven't very much." I said "All I have is just a few bills in a billfold"; I said "in my hip pocket."

I reached back and got it—I said "I don't have any gun, so (20) don't get excited" or something like that. I reached back and pulled out my wallet and handed it to him; and I think I said to him at the time, I said, "I would like to keep the wallet, if you will take the money out."

"The wallet is an old-time wallet I have and has more or less sentimental value to me"; so he took the money out and left the wallet on the top of the desk.

Q How much money did he take?

A Well, there was six dollars of hotel money and, as I remember, I thought there was two or three or four dollars of my own money; approximately seven dollars all together; eight or nine. I know there was six dollars of hotel money definitely because I kept track of that.

Q Okay, sir. Let me ask you this: Would you look around the court room and tell us whether or not you see this man in the court room that you described as putting this gun at your side?

A Oh, yes. He is the gentleman in the blue shirt over there. (20)

MR. TITUS: May the record show that the witness had indicated the defendant?

THE COURT: It may so indicate.

BY MR. TITUS:

Q Now, Mr. McGrevy, after you gave him the money from your wallet, (21) what happened then?

A Well, with the gun—he didn't use any physical pressure on me on anything, but he sort of grabbed me or moved me toward the door and says, "Get in there."

Q Toward what door?

A In the parlor that was, you know, that I had come out of.

Q All right.

A And as we went in there he felt to see if there was a lock on the door that he could lock it. It so happened he couldn't lock the door; he pulled it shut. But before that, I think he said—I think about the last thing he said, "Now," he said, "don't call the police. There is no use of you calling the police; they couldn't catch me anyway." And he said "If you do, I will come back and kill you."

Q And what happened then, sir?

A Then I was in the parlor there. I stood in the parlor listening, of course, to hear for him going, and a few moments there seemed to be silence, and then I heard a step toward the door and then I heard him step down and walk down the steps, those iron steps in front of the door down to the sidewalk, and I heard him walk down; and I waited another two or three minutes—I didn't want to take any chances on being shot; so I waited a few minutes—three or four minutes, I guess; and then I finally came out and peaked (22) out the glass window of the door and looked out and I couldn't see any sign of him, so I went right back and telephoned the police.

The telephone was right in the hallway there, just a few paces back from the desk.

Q Now let me ask you, Mr. McGrevy: This hotel that you described is located here in the District of Columbia; is that correct?

A Yes, sir; not far from here.

Q Now, subsequent to the time that you went back to the telephone and notified the police, did there come a time later on that same day or any time later when you saw the defendant again?

A Yes. I saw him in the Robbery Squad Room at police head- (22)
quarters, I guess you would call it.

Q Did you hear him make any statements pertaining to this hotel where
you worked, the Court Hotel?

A Well, I made a written—rather, I made some dictation there and one
of the men took down my statement.

Q Do you recall anything the defendant said about the Court Hotel
that morning?

A That he said?

Q Yes; at the Robbery Squad office.

A No, I don't. Just now I couldn't say.

Q All right. (23)

A I don't remember him saying anything. I just saw him talking to
one of the officers there. I didn't hear what he said.

Q You didn't hear what he said?

A No, sir.

MR. TITUS: Your Honor, may we at this time approach the bench for a
ruling prior to my next question?

THE COURT: Yes.

(Bench conference:)

MR. TITUS: Your Honor, the Taylor Case; of course, I assume that the
Court would rule that we would not be allowed to put on psychiatrists from
Saint Elizabeth's Hospital in view of that ruling from the Court of Appeals.

However, I would like to ask the Court at this time—I intend to go
into questioning of each lay witness as to their recollection of his attitude
of whether or not he evidenced any signs of abnormality at the time.

THE COURT: That is all right. You have a right to do that.

MR. TITUS: Yes, sir. I just wanted to get the ruling on the record as
to that.

THE COURT: Yes. Sure. You can do that.

Claim of probative value for the jury. No question about that.

MR. TITUS: Thank you. (24)

(Open Court:)

BY MR. TITUS:

Q Now, Mr. McGrevy, about what amount of time would you say it was
that transpired between the time that the defendant came into your hotel and
the time that he left from the front door as you described? Approximately.

A Well, I would say—I don't think it was over ten minutes. (24)

Q Over ten minutes?

A I don't think so. It might have been even less than that. But I am pretty sure it wasn't over that. Because he didn't stick around long.

Q Pardon me?

A He didn't stick around at all after that.

Q During the time you had an opportunity to see him and observe his actions; did you not; as you described?

A Oh, yes. I sized him up as well as I could, because I figured that it was good thing to know.

Q I didn't hear you.

A I sized him up as well as I could so I would be able to identify him.

Q What would you say, Mr. McGrevy, in your opinion were the actions of this defendant? Did he act to you in any abnormal or unusual manner? (25)

A Well, no; nothing abnormal, only that he was robbing me at gunpoint and he had a gun there, and of course that for me was abnormal.

I never had anything happen to me like that before.

Q The fact that he was robbing you?

A Was an abnormalcy to me, but I wouldn't say there was anything abnormal in his conduct. So far as carrying on a robbery is concerned, I suppose that is the normal way they go about robbing with a gun.

Q In the course of the time he was in there with the gun and the statements he made did he say anything which to you as a normal human being, observing other people, would indicate that he was in any way insane, abnormal or working under any impulse or compulsion?

A No; no. I might say one thing, but it might be based upon my opinion, if you wish.

Q Well, that was what I was asking for, your opinion.

A Well, no; no indications of insanity, but I just surmised—I don't know whether that—a little more than a guess—that he had been drinking a little although he was not intoxicated by any means. He was far from intoxication.

Q He had been drinking a little bit?

A I think so. It is my judgment that he had a few drinks in him, (26) but he was not intoxicated by any means, or near intoxication.

Q Mr. McGrevy, did you have an opportunity to see the pistol or the gun or revolver that was held in your side?

A Oh, yes; I looked down at it as he stuck it in my side. (26)

MR. TITUS: I want to have this marked, if it please the Court.

THE COURT: That is all right.

MR. TITUS: Mark it Government's 1 for identification.

(The revolver referred to was marked Government's Exhibit 1
for identification.)

MR. TITUS: May the parts also be included? I had it broken, if your
Honor please, on purpose.

THE COURT: Yes.

BY MR. TITUS:

Q I show you, Mr. McGrevy, what has been marked as Government's
Exhibit Number 1 for identification, this revolver. Would you look at that
and tell us whether or not you recognize it as the type that was used that
morning?

A Why, yes; certainly; it is just about; and I would say it is the
gun, or very much like it, I mean.

Q The gun or very much like it?

A Yes. It was short-barreled, I know; and it was nickelplated. (27)
I remember those things about it. That is just about it.

MR. TITUS: Your witness, Mr. Ahern.

CROSS EXAMINATION

BY MR. AHERN:

Q Sir, the defendant was in your hotel a total of how many minutes,
approximately?

A Well, I think it was not over ten minutes, I would say.

Q Not over ten minutes?

A No; I don't think so, as far as I can recollect.

Q And the only conversation he had with you as to the money, telling
you that it was a robbery or a stick-up, and then telling you, "Don't call
the police, they couldn't catch me anyway"; didn't that sound a little
abnormal to you?

A Well, no; not exactly; because I figured that he probably had a
fast car out there and figured he would be gone far and maybe out of the
District before the police could get around to it.

Q I assume that you have discussed this case with the District
Attorney; is that correct?

A Well, yes; yes.

Q And you have been told that you would be asked questions about (27)
his sanity or his insanity?

A Well, no; not exactly; I haven't been told that.

Q You were questioned by the District Attorney concerning the (28)
theory of sanity or insanity, were you not?

A I think the District Attorney asked me like he did here, that if I
thought there was anything abnormal in his conduct, as related to insanity.

Q Of course, you have had no training in the field of psychiatry,
have you, sir?

A How is that?

Q You have had no training in the field of psychiatry?

A Well, I studied psychology for two years in college.

Q But you are not a qualified psychiatrist, are you?

A No, no.

Q You don't think by talking to a person or observing a person for
ten minutes that you could form any opinion as to whether they are of sound
mind or unsound mind, do you?

A Well, I think I could in a case like that.

Q You think you could?

A In the case of robbery I think I could tell whether it was a sane
man or a crazy man that was holding me up.

Q And you think you could do that in a period of ten minutes' time
even though you have no degree in the field of psychiatry?

A I think so: In a situation like that. Not ordinarily on the street;
but in a situation like that I think I could.

Q In other words, you could tell that the man was robbing you, (29)
whether he was of unsound mind, in ten minutes, but if he wasn't robbing you,
you couldn't tell in ten minutes; is that it?

A I think if I talked to him for ten minutes I could tell pretty well.

Mr. AMERN: No further questions.

Mr. TITUS: That is all.

ROBERT N. FORRIGHT

was called as a witness by and on behalf of the Government, and, being first
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(30)

BY MR. TITUS:

Q Officer, state your name and your present assignment, please sir.

A Robert N. Forright, assigned in plainclothes, Juvenile Bureau. (30)

Q Prior to that assignment where did you work, sir?

A Number 3 Precinct, sir.

Q Private Forright, directing your attention to September 11, 1952, where were you working at that time?

A I was assigned to 31 Scout Car, Number 3 Precinct, sir.

Q In a scout car did you say?

A Yes, sir.

Q Out of Number 3 Precinct?

A Yes, sir.

Q Directing your attention to the defendant in this case, Charles Douglas, seated at the counsel table here in a blue shirt, did you have occasion to arrest him?

A Yes, sir, I did.

Q Do you recall about what time of day or night it was that you placed him under arrest?

A Yes, sir; it was approximately 3:20 in the morning of September 11th, 1952.

Q Where was he, Officer Forright, when you placed him under arrest? (31)

A He was in his automobile at 15th and K Streets Northwest.

Q 15th and K Streets Northwest?

A Yes, sir.

Q And would you describe what occurred when you placed him under arrest; how you placed him under arrest and what, if anything, he had to say at the time you put him under arrest?

A On information received we stopped the defendant's automobile at the intersection of 15th and K Streets Northwest. I opened the door of the auto. At that time the defendant had some money in his left hand. He asked me what I wanted. I told him I wanted him for a hold-up at the hotel. He says "Well, this money belongs to me."

I took him out of the car and at that time the other units responded.

Q The other units responded?

A Yes, sir.

Q What other officer, if you recall, was there at the time when the other units responded? What police officer came on the scene?

A Well, Lieutenant Hughes, who was then a sergeant at that time, came on the scene.

Q He was then a sergeant? (31)

A Yes, sir. (32)

Q And he responded to the scene; is that correct, sir?

A Yes, sir.

Q Private Forright, I show you what has been marked Government's Exhibit 1 for identification. Would you look at that and tell us whether or not you have seen it before, sir?

A Yes, sir. That is the gun. It was turned over to me by Lieutenant Hughes in the Robbery Squad.

Q How do you recognize it as the gun, sir?

A At the time the gun was turned over to me, I marked it with my initial "F" on the frame, the trigger housing and also on the cylinder.

Q Now, sir, there came a time when you--let me rephrase that question:

Did there come a time when you were present when the defendant was questioned concerning the Court Hotel?

A Yes, sir.

Q Were you present at that time?

A Yes, sir, I was.

Q Officer, I show you a document marked Government's 2 for (35) identification, what purports to be your signature on there. Would you look at that and tell us whether or not that is your signature on there, sir?

A Yes, sir, it is.

Q Were you present at the time that statement was made, sir?

A Yes, sir, I was.

Q Now, Officer Forright, when you first observed the defendant up until the time that you completed your part of the investigation of this case, would you tell us your impression of the defendant as to whether or not he acted to you in an unusual or insane or unnatural manner at any time when he was in your custody?

A No, sir. He acted with the belligerence that would be normal to anyone just placed under arrest.

Q Was that word "belligerence"?

A Yes, sir.

Q Any other action of his that you could describe for us?

A No, sir; nothing outstanding other than his--

Q When you referred to belligerence, what did you mean; can you describe that a little more?

A By that I meant his tone of voice in answering questions and (35)
just general remarks.

Q Was belligerent? (36)

A Yes, sir.

Q Did he do or say anything which would give you the impression that he was of unsound mind at the time he was in your custody or while you observed him?

A No, sir.

Q Pardon me?

A No, sir.

Q Did you or anyone else in your presence at the time that this statement was made by the defendant, which I asked you to identify--did you or anyone else offer any inducements to him by way of promises or make any threats, or use any force or coercion on him to obtain that statement?

A No, sir.

Q And you were present, were you, during the entire time of the statement?

A At the time of that statement; yes, sir, I was.

Q And do the words and phrases in that statement represent what he said? By "he" I am referring to the defendant Charles Douglas.

A Yes, sir.

MR. TITUS: Your witness.

CROSS EXAMINATION

BY MR. AHERN:

Q I assume, Officer, that you have no degree in the field of (37)
psychiatry, do you?

A No, sir.

Q And you weren't observing this man at the time for the purpose of determining whether he was of sound or unsound mind, were you?

A No, sir.

MR. AHERN: No further questions.

MICHAEL J. UPPERTI (38)

was called as a witness by and on behalf of the Government, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q Would you state your name and assignment, please, Officer?

A Michael J. Upperti, Detective-Sergeant, Robbery Squad, (38)
Metropolitan Police Department.

Q And, directing your attention to the date of September 11, 1952,
where were you assigned at that time, sir?

A To the Robbery Squad, sir.

Q In the course of your duties did there come an occasion when you
had in your custody the defendant in this case, Charles Douglas?

A Yes, there did.

Q Did you question him, sir, concerning the alleged hold-up at the
Court Hotel at 410 - 6th Street Northwest?

A I did, sir.

Q Did he make a statement which was reduced to writing or put (39)
in typewritten form?

A He did.

Q Did he sign that statement?

A He signed the statement, yes, sir.

Q Did he sign it in your presence, sir?

A He did, sir.

Q Did you or anyone else in your presence use any force or coercion
or duress of any type to obtain that statement?

A At no time, sir.

Q Were any promises made by you or any other officers who may or may
not have been present at the time that you saw him--were any promises of any
kind, or threats or force or coercion used at any time during the course
that you saw the defendant?

A No; no promises were made.

Q I will show you, Detective Upperti, what has been marked as Govern-
ment's Exhibit Number 2 for identification.

Would you look at that and tell us whether or not you recognize
that, sir?

A Yes, sir; this is the statement that was taken from the defendant
Charles Douglas.

Q Is your signature on that statement?

A Yes, my signature.

Q Were you present at the time that statement was obtained? (40)

A I was present.

MR. TITUS: If it please the Court, may the Government at this time (40)
formally offer this statement into evidence, and ask permission of the Court
to read it to the jury?

MR. AHERN: I have no objection.

THE COURT: It will be received.

(Government's Exhibit Number 2 was received in evidence.)

MR. TITUS: This is Government's Exhibit Number 2:

"Office of the Robbery Squad, Metropolitan Police Department, D. C.,
September 11, 1952, 7:30 a. m.

"To Charles William Douglas: You now are requested to make a
statement of the facts in this case to the best of your knowledge.
However, you are advised that you are not compelled to make a statement,
are not promised anything for making one, and do so of your own free
will. If necessary, the statement you make will be used against you in
court.

"Having been so advised, are you willing to make a statement?

"Reply by Charles William Douglas: Yes, I will.

"I drove my car in the same block the Court Hotel is located, (41)
and parked. I went inside the Court Hotel where I saw a white man
about fifty years old. I told him to give me the money as I held my gun
on him. This man reached in his wallet and handed me six dollars in
bills. I ran out of this place, went to my car, and drove up to Tenth
and H Streets Northwest."

Signed: "Charles William Douglas.

"Witnessed: Patrick A. Denahan, Michael J. Upperti, Private
Robert N. Forright."

BY MR. TITUS:

Q Detective Upperti, during the time you observed and were present
during the questioning of this defendant Charles Douglas, did he do or say
anything which would give you the impression he was of unsound mind; any
actions or statements of his?

A No, sir. When I first questioned the defendant, he refused to answer
our questions. He was slightly belligerent, but after talking to him for a
while he calmed down and he talked to us just as normally as any other person
would.

Q Just as normally as any other person would?

A I would say so, yes, sir.

Q Did he indicate by any signs or actions on his part that he (41)
was suffering from any delusion or didn't know what he was doing?

A No, sir. He was fully aware of what he was doing. (42)

Q Fully aware?

A Yes, sir.

MR. TITUS: Your witness.

MAY PRICE (44)

was called as a witness by and on behalf of the Defendant, and, being first
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ASHERN:

Q Are you related to the defendant?

A Yes.

Q What is your relationship?

A Sister.

Q Now, directing your attention to the year of 1952, where was the
Defendant Charles Douglas living at that time?

A 1309 Rhode Island Avenue Northwest.

Q And where were you living at that time? (45)

A The same address.

Q He was living with you?

A With me.

Q During that time did he exhibit any unusual behavior around the
house?

A Well, he began to feel bad and he had severe headaches.

Q When did that start, if you can recall?

A Well, that started around the last of March.

Q You say he had severe headaches. Tell us what would happen.

A Well, he used to pull his hair and he used to lie around--he didn't
eat; and he had to stay home from work a couple days with severe headaches;
and he pulled his hair, beat his head against the wall.

Q Now, did anything unusual happen during the month of April, of 1952?

A Yes. He came in one night and he was out; and he came and he at-
tempted suicide.

Q Tell us what you saw. (46)

A Well, I noticed a light and I had already gone to bed. I noticed a
light in the hall; in the bathroom; and I got up and I came out and he had had
some wires connected and had the radio setting on the chair aside the bath tub
and had the bathtub half full of water.

Q And what did you do?

(46)

A He put the radio in the water; and he was going to get in the bathtub; that is what it was; and I jerked the wires all down, because I knew that is what he had intended to do.

Q Now, again in April, did he do anything unusual?

A Well, and it was just about a week later then; around about the 20th, after that, why, he stayed up and we all went to bed and he was sitting around; and finally a little later, why, I noticed that the light was still on and—

Q Where was the light on?

(47)

A In the living room. He tried to hang himself that time.

Q Tell us what you saw and what you did.

A Well, I just didn't see the rope or anything, but I saw on the pipe—we lived in the basement and it had that asbestos stuff over the pipe and seen the mark in there where he had had the rope around there; and then he carried a ring around his neck where the rope had took the skin off his neck.

Q Well, did somebody cut him down or how did you get to him?

A I don't know. I tell you—I don't know all about that. I just know that it—it wasn't so far and I don't know whether he had a chair there or what, but anyway he tried to commit suicide by hanging.

Q Did he ever attempt to commit suicide on any other occasions during the year 1952? If you know.

A Well, he had gotten a big—I had a big knife, a great big carving knife, and he had that lying on the floor beside the couch.

Well, do you believe that during that time your brother was suffering from a mental condition? (48)

A I do.

Q Before 1952 had he ever attempted any of these things, to your knowledge?

A Sir?

Q Prior to 1952, had he ever acted in this manner?

A Well, he had headaches all along but he had never attempted to do anything.

Q Did you ever attempt to get any medical assistance for your brother? (49)

A I did.

Q What did you do?

A I wrote to the Veterans Administration, Malcolm Ross, and he (49)
wrote me a letter back and he told me that--

MR. TITUS: I object, if the Court please.

BY MR. AHERN:

Q Well, were you able to get medical assistance for him?

A He said Charles had to come down willingly.

MR. TITUS: That is hearsay.

THE COURT: Yes; that is hearsay.

MR. AHERN: You can't tell us what was in the letter.

BY MR. AHERN: (50)

Q Were you able finally to get any medical assistance for him?

A No.

Q Do you believe during this time that your brother was of unsound
mind?

MR. TITUS: If the Court please, again I am going to object and ask
counsel to state what time.

THE COURT: Which period, counsel?

MR. AHERN: During the period that you talked about in the year 1952.

THE COURT: April and May, I take, counsel.

MR. AHERN: That is correct.

THE COURT: Yes.

MR. AHERN: During those months do you believe your brother was suffering
from a mental disease?

THE WITNESS: I do.

MR. AHERN: No further questions.

MR. AHERN: Mr. Titus-- (51)

Would your Honor allow me to excuse this witness at this time? Doctor
Gilbert has just arrived.

THE COURT: All right.

JOSEPH L. GILBERT

was called as a witness by and on behalf of the Defendant, and, being first
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (52)

BY MR. AHERN:

Q During 1952, did you receive a request or order from this court to
examine one Charles Douglas?

A I did, sir, received an order from this court to examine Charles
William Douglas

Q And did you conduct an examination of Charles William Douglas? (52) (53)

A I did, on December 6th and December 13th, 1952, at the District of Columbia Jail. Yes; at the District of Columbia Jail.

Q And do you have with you any notes that you made concurrent with the examination?

A I have.

Q Can you testify independent of those notes or do you prefer to refresh your recollection from the notes which you made at the time?

A Well, I prefer to use the notes to recall in detail at least the case.

Q As a result of the examination of Charles William Douglas did you arrive at a conclusion concerning his mental condition?

A As a result of my examination I did arrive at an opinion regarding his mental condition.

Q And what was that conclusion?

A That as a result of my examinations of Charles William Douglas it was my opinion that he was of unsound mind and that he was suffering from the most common type of mental disorder, dementia praecox, and as a result of the order of the court I so reported.

Q What were some of the manifestations which led you to this conclusion? (54)

A Well, the presence of the symptoms that constitute dementia praecox, now more, perhaps, commonly known as schizophrenia, but the terms are interchangeable and are used for the same mental disorder.

Namely, in doing an examination, the routine facts are obtained as far as possible and then as near as possible the beginning of the symptoms that constitute the mental disorder, and the symptoms that as a result of my examination at that time were obtained, and I believed to be present.

He stated that his mental illness--leaving out the basic facts--that he said he believed the symptoms that he expressed to me had been going on for a long time, especially the symptom of hallucination of hearing.

A hallucination is perception without stimulation; in other words, hearing, seeing; seeing, smelling, feeling or testing things that are not present; and that he believed he had been called bad names and profane names; and profanity had been used toward him; and that associated with these hallucinations were beliefs or delusions that he had been followed; that the same vulgarity and profanity that was referred to him in connection with the (55)

voices or hallucinations were also, he believed, applied to his family: (55)
His mother and his sisters; that lies were spread; that whoever was doing this he believed could not be trusted and that he referred to at the beginning of this illness as having started, he said, just after he came out of the Navy.

I have that date somewhere, or the approximate date; and that they followed him from Washington to Virginia and back again; that there were efforts on the part of whoever it was that was persecuting him; to keep poor; that they wanted to keep him--they wanted to prevent him from ever having anything, to keep him from getting ahead.

He did not know who did those things, but he knew the voice.

In addition to the hallucinations of hearing and delusions of persecution, he was confused, showed difficulty in thinking; his memory was somewhat impaired by reason of his interference with thinking and inability to coordinate his thoughts; and he was somewhat disoriented; that is, he wasn't completely in touch with time, persons, and place.

In other words, orientation means that one is aware of time (56)
and person and place, relationship. And he was not completely oriented.

And these symptoms continued during his time in the jail. He said he couldn't catch them, whoever they were, that were calling him these bad names; and he thought, too, that some of these symptoms had been going on while he was in the Navy; and that some in the Navy turned others against him; and he referred to strangers and others that he knew as his enemies; in addition to the impairment of memory, he was dull and confused; and showed this blocking or impairment of--or an inability to communicate normally.

The voices continued to keep him awake and to wake him from sleep. They yelled and hollered at him and told others to do the same.

Those were essentially the outstanding symptoms elicited and as a result of the condition as I believed it existed, I reported that he was suffering from--that in my opinion he was suffering from dementia praecox on the date given, December 15th.

BY MR. AHERN:

Q Doctor, do you believe this condition had existed for some time prior to December?

A In my opinion it had existed for a considerable period of time.

Q In your opinion, specifically do you believe that as of (57)
September 10th or 11th, or during the month of September, some three or four months prior to December, that this condition existed?

A Well, in my opinion it had been going on for several months (57) or at least a few years. I don't see the date here that he left the Navy, offhand. I probably have it somewhere.

Q When you say several months, then, Doctor, would that include, or embrace the period of September?

A Yes, it would. I have the dates, according to the information I have, that he left the Navy along about 1947.

Q And if he had committed an unlawful act in September, could you say whether or not there would be a causal connection between the act and this mental disease that he was suffering from?

A I would say there was a causal connection between the mental (58) disorder and the condition as I believed it was present at the time.

Q Then would you say that this act would be the product of the disease?

A From the symptoms present I would think there was a very definite causal relation.

Q And have you observed many people who have attempted to malingering or attempted to fool you?

A Not many, because I haven't discovered many malingerers. I have discovered a few.

Q And in your opinion was this man malingering at all?

A No, in my opinion he was not.

Q Your opinion is that this man was sick; is that correct?

A That he was mentally sick; that is correct. (59)

Q And as a result of your conclusions did you testify here in court in the United States District Court some time in 1953 concerning his insanity?

A Well, the court record shows I did at the time of his adjudication or commitment.

Q And when was he adjudicated of unsound mind?

A Well, the court record says December 19, 1952.

Q And do your records indicate that he was then committed to Saint Elizabeth's Hospital?

A No. My--yes; my records would; but the record, part of which I do not have, would show that.

Q I see.

A My records that I have show that he was adjudicated.

MR. AHERN: No further questions.

CROSS EXAMINATION

BY MR. TITUS:

resumed the stand, and, having been previously sworn, was examined and testified further as follows:

CROSS EXAMINATION (Resumed)

BY MR. TITUS:

Q And then I believe the next time that he did anything that you (81) described as really abnormal, that was the suicide attempt.

A That is right.

Q Which was around April 15th?

A Well, approximately. It has been so long. I know it was in the first part of April, in the middle, that he did this. He also, -- I forgot to--had another attempt of trying to commit suicide by turning on the gas.

Q Oh. Now would you tell us when that was?

A Well, that was right after the time of the hanging and the hanging was around about the 15th I think.

Q And besides calling your brother, did you notify any authorities (92) at that time: Like the police?

A No; because I didn't see him do it and, I mean, some days he was all right and some days he wasn't all right; and I didn't --

Q You mean some days, he acted perfectly normal to you?

A Some days, yes; and some days he didn't.

Q And on other days he would act abnormal?

A That is right.

Q And try to do these things? (93)

A Yes.

Q Now, during the month of September, of 1952, he was not living with you, was he?

A No.

Q Do you know where he was living at that time?

A It was on M Street, 12th and M Street; but I don't know exactly. 12-something, --

Q Was he living alone there?

A He was rooming there.

Q Did you make a point or effort to go around and see him. (95)

A It was only from July to September so I didn't get acquainted with anybody.

Q In September he was arrested, wasn't he?

A Yes, that is right.

Q So between the time he moved and the time in September did you make any effort to go around and tell her about these three occasions when he tried to commit suicide?

A No.

Q Were you afraid he might do it, being alone there in a rooming house without any friends around?

if.. A Well, I don't--I--I didn't know what he might do. I figured that if she would see what he was doing, if he did anything--

Q You left it up to her, the landlady, to find out what he would be doing?

A Well, like I said, at times he was all right and times he wasn't (95)
all right.

Q You figured he would be all right then, did you?

A I figured he would probably be all right.

MR. TITUS: I think that is all, your Honor. (96)

THE COURT: I should state to you ladies and gentlemen of the jury (100)
that because of the physical condition of Doctor Gilbert, he is not able to
be present, at least today, for further cross-examination.

So the Government has waived its right to further cross-examine Doctor
Gilbert.

MR. AHERN: And the defense rests at this time, your Honor.

OPENING ARGUMENT ON BEHALF OF THE GOVERNMENT

BY MR. TITUS

MR. TITUS: May it please the Court, ladies and gentlemen of the jury:

The facts of the case are now for you to determine. To begin with, we
will get to, for a brief recollection of what the crime was here, and what
the nature of the crime was, in order that we can get some idea as to (101)
whether or not such a crime could be committed under the conditions which
have been used as a defense in this case--the crime is one of robbery.

It is a robbery committed by the use of a gun.

I don't think there has been and I don't think there has been offered
here any testimony which would in any way indicate that this crime was not
committed by the defendant.

The defense, as outlined by defense counsel, is one of insanity, so
there is no contest, as I see it, that this crime was not committed physically
by the defendant Charles Douglas. And you heard a description of the nature
of the crime itself; what it consisted of and how it was committed.

And I think that is important. The reason I outlined it is this reason:
They have used a defense of insanity, which means in effect this: That on
September 11th, 1952, at 3:15 or thereabouts, in the morning, this defendant
was so insane that the crime which he committed was a product or result, or
was connected by some causative factor with that insanity.

In effect, and actually, that is the defense, because insanity is defense
in this jurisdiction--the court will so define it for you--but it is not just
a disordered mind; it is not just an emotional disturbance. It has been (102)
specifically defined in this jurisdiction.

Now, you have heard the testimony of Mr. McGrevy, the person who (102)
was robbed. You have heard the testimony of the officer who made the arrest;
and you have heard the testimony of the investigating officer who was present
and took the signed confession.

You have heard them testify as to their opinions, as laymen, of the
mental condition of this defendant at the time that they had him in their
custody and saw him.

And, ladies and gentlemen of the jury, I submit to you that you have an
opportunity here to employ common sense. This crime was not committed during
the broad daylight hours where there would have been a crowd of people to see
the defendant in and out of the hotel. It was not committed in such a manner
as to indicate that there was any flamboyant insanity on the part of this
defendant. It was a planned, stealthy crime of the nature of a person who
had set down and schemed and decided what he was going to do.

He went into a hotel with no other people around. He walks up to the
registry desk and mentions something about a room, and then when he sees
that there is no chance of anyone else surprising him in the lobby or the
parlor of the hotel, then produces a revolver and demands the money, and
then looks around for a place to lock up his victim and then threatens (103)
his victim and says to him, in effect, "If you come out within ten minutes
or if you call the police, I will kill you."

You heard those words. That is your recollection.

Now, basically, ladies and gentlemen of the jury, that is not a crime
and not a type of crime which is the result of a disordered or disoriented
mind. That is a crime of a person who can scheme and plan and figure the odds.

And, ladies and gentlemen of the jury, as to his recollection--and I
think that was the most surprising thing I ever heard from a psychiatrist on
the stand--I couldn't make heads or tails out of the testimony of Doctor
Gilbert.

I am sorry he is sick, too. I am very deeply sorry that anyone would be
ill, but as the court indicated to you the Government waived further
cross-examination of that doctor because of his physical condition.

But I submit to you, ladies and gentlemen of the jury, that I think you
heard enough.

How did he get the information which he read and which he had on those
notes or papers which he took? He got that information from this defendant.
This is the man who recalled having worked for a certain number of years, and
you heard confirmation as to his jobs from his sister.

This is the man who gave the information as to his sister's address (104) and her home, and then the doctor sits there and tells us, ladies and gentlemen of the jury, that he didn't know whether it was true or not; that that was immaterial.

I wonder if it was immaterial when this defendant told him that he was suffering from delusions?

It is utterly fantastic that any man, psychiatrist, layman, doctor, physician or whatever he may be, can come before a jury of sensible people and say to them, "I think this person is crazy because of what he told me."

I don't buy that and I don't think you do.

I could tell any psychiatrist in the world that I had delusions, that I thought that gentleman over there, for instance, was trailing me down the street and was going to knife me in the back; and if they are as gullible as that man is, he is going to find me of unsound mind and I am going to come before a jury and he is going to get on the stand and is going to say "He was crazy", and then I am going to walk out of the court and I am a free man.

Isn't that a beautiful way to escape justice?

If a psychiatrist is a psychiatrist, if he knows what he is doing, he is going to confirm everything told him by his patient, through the relatives, through the other places where this man may have been; his employment, his job, and his service record, and when he comes into court to testify (105) about that man, he is not going to say to you, "I learned all these facts from him, and I believed him."

Here is what he is telling you: He is telling you that on the situation as to this man's background, that may be true—and, ladies and gentlemen of the jury, it was true.

Then he is telling you, when he says he has delusions, when he says that he was sick, and so forth, he is accepting that as true.

But in the same breath he is telling you it doesn't matter whether the first things were true or not—that was immaterial to him.

My point is this: A person could be just smart enough if he has the recollection, as to be able to tell about his background, to tell about his employment, and so forth, when he gets to the point of where he wants to convince the doctor; he simply says, "I had delusions. I was sick. People were talking to me"—whatever he may say.

And you heard the doctor. And that doctor takes that to be the truth to the point that he does nothing else but believe the patient and says he is crazy.

Then I thought the most interesting thing I heard the doctor say (105)
in response to a question by Mr. Ahern concerning malingering.

Now, what is a malingerer? A malingerer is a person who is charged (106)
with a crime, as a rule, who decides that he will, in the common, everyday
street expression--and you have heard this before, undoubtedly--bug out.
That is a criminal expression. It means that they will become crazy for the
purpose of avoiding justice.

And Doctor Gilbert says "Well, I have found very few malingerers in my
experience", he says. I wonder what other people would say?

He has found very few malingerers and I think, I believe that implicitly,
because he believes everything apparently his patients tell him, and he would
never find a malingerer if he used that method.

He would find a malingerer if he checked what his patient told him against
the facts and the record.

And then he said the most implausible thing to me of all--and this I
don't like to see done--he wasn't content with saying that in December of 1952
this defendant was of unsound mind. He comes before you under oath and says
that back on September 11th, 1952; October, November, and December; three
months' interval almost; that back on that date he was not only insane,
ladies and gentlemen of the jury; he was so insane that the crime was a
product of that insanity.

Now, that is what that man did on the stand. Not content, now, with (107)
the time that he examined him--and you have heard other psychiatrists--this
is not a new jury--how many psychiatrists will examine a man in December and
go back three or four months and say that on a specific day this man was so
crazy that the crime he committed was the result of that insanity?

That is what he did. Do you know the position that put the Government in?

I tried during the time that he was on the stand, to bring out and explain
to you--have him explain--what was the basis of his finding, and I took those
notes and Doctor Gilbert said to you that he examined this defendant on two
occasions, and I never did pin him down to the time, because he said, "I don't
remember." I said "Give us your best estimate."

His first estimate was about two hours on the first occasion and maybe
three or more hours on the second occasion.

Do you believe that?

Those notes that he had, those two pages of notes--and those were what he
was testifying from now. As you recall, he said, "I have to refresh my recol-
lection from the notes." And he used those notes.

Do you think those two pages of pen notes are a result of five (107)
hours or more of intensive investigation and the conduct of a psychiatric
examination of this defendant?

And that is what he was testifying from here. And what was in those (108)
notes?

Ladies and gentlemen of the jury, I want to now touch briefly on the
sister. The sister testified concerning certain incidents that occurred in
the home. Three attempts at suicide. And I think that comes down to this:

She alone has testified to Number 1--you haven't heard anyone else; you
haven't seen anybody else produced here, sons or brother.

Number 2: What, if anything, did she do about these so-called suicide
attempts? He moves out of her house or apartment into a rooming house run by
a woman she said, I believe, that she had seen once or met once. Not one bit
of information was given either to her or to the employer as to this man's
attempted suicides.

Wasn't there a great deal of concern on her part? She didn't even wake
her twenty-two-year-old son in the house when she found this man, she said,
in the process of trying to commit suicide.

And when was that? Around the period of March, April and May of 1952.
She said one thing that I thought was extremely important. She said one of
the reasons she didn't do anything about it or tell someone about it was
because some days he would be all right and other days he wouldn't.

Taking my story as true, and I might say this: Could it not be from (109)
her, as the sister, during this period of time that on the date of September
11, 1952, our friend, the defendant here, wanted some money, pure and simple
motive of money?

THE CLERK: You have five minutes, Mr. Titus.

MR. TITUS: Thank you.

Was that or was that not a possibility?

THE COURT: That is, you have a total of five minutes left of your twenty.

MR. TITUS: Yes. I understand that, your Honor.

I ask you ladies and gentlemen of the jury to consider that, to ask
yourselves whether or not the testimony of the doctor made sense to you as
human beings, as common, ordinary, everyday intelligent people.

Is that the type of testimony that is going to bring about a verdict of
not guilty? It is in your hands.

Thank you.

BY MR. AHERN

MR. AHERN: May it please the Court, Ladies and Gentlemen of the Jury:

I have heard many an argument, but I don't believe I have ever heard such a distorted argument in all my life.

In the first place, we are not asking you to let this man walk out (110) of the courtroom, as Mr. Titus said; we are not asking you to find him not guilty so he can walk out that door.

We are asking you to find him not guilty by reason of insanity in order that his Honor may exercise his discretion as to what will be done with him.

So, don't let Mr. Titus mislead you. We are not asking you to let this man walk out of this door at all.

So that is the first point; and let's get that straight, and I hope that Mr. Titus clarifies that in his closing argument.

The second point that rather amazed me is the fact that even though Doctor Gilbert was the chief of Psychiatry for some 23 years at the D. C. General, and is now Chief of Psychiatry at St. Elizabeth's Hospital, apparently Mr. Titus knows much more about the field than Doctor Gilbert, and I suppose all the doctors at Saint Elizabeth's.

This man who Mr. Titus says was malingering, and Mr. Titus would do it another way if he were examining him—I don't know; perhaps he should have studied psychiatry instead of law, because he seems to know that there is some other way of determining whether a person is of sound mind.

In other words, he thinks that if a man tells you he lives at 415 L Street, you should go down to 415 L Street and find out if he lives there.

Doctor Gilbert told you that was basic information and that it (111) meant no difference whether it was the truth or not as to whether he lived at a given address or whether he worked two years or whether he worked three years.

Now, I don't know anything about psychiatry. I think it is a very complex field. But Mr. Titus qualified—he stipulated that this man was an expert, and has he brought any expert in here to contradict him?

MR. TITUS: I object, may it please the Court. May we approach the bench for a ruling from the Court?

THE COURT: Yes.

(Bench conference:)

MR. TITUS: If it please the Court, that remark has in my opinion—and I would like the record to show this—

THE COURT: I don't think it is improper. (111)

I think it may necessitate the Court explaining the Taylor case to the jury.

MR. AHERN: I didn't finish my statement.

THE COURT: What were you going to say?

MR. AHERN: I was going to say the method of examination--

THE COURT: Yes; that is what I say.

MR. AHERN: He interrupted before I had a chance to say.

THE COURT: The Government of course could call in a psychiatrist (112) who examined him for the purpose of testifying. He can comment on that. The psychiatrist may not be able to express an opinion, but he could get on and say that he couldn't express an opinion, and that would be contrary to the defendant's position.

You see, you can get a psychiatrist who could examine this defendant, get on the stand and testify that in his opinion, what his opinion was as to whether he was of sound or unsound mind at the time he examined him, and then you could ask the psychiatrist, "Can you express an opinion from such an examination whether he was of sound mind or unsound mind at the time of the robbery;" and if the psychiatrist said "No, I can't express an opinion", then that would refute the defendant's position here that the psychiatrist from such examination could express an opinion. And he has a right to comment on it.

MR. TITUS: Then do I have a right to counter-comment on it?

THE COURT: Well, I say, I think that necessitates probably the court explaining to the jury that the government couldn't call the psychiatrist from Saint Elizabeth's Hospital, because that would be privileged.

MR. AHERN: Well, all I am going into, all I was going to say, contradict this method of examination.

THE COURT: Yes; but that puts it in the framework where the jury (113) might wonder why Saint Elizabeth's psychiatrist isn't in here and I think in view of that I will have to explain that the Government would not be restricted to having a psychiatrist who examined him for the purpose of trial, but would be restricted on the ground of privilege.

MR. TITUS: Thank you, your Honor.

MR. AHERN: Sure. That is all right.

THE COURT: All right.

MR. TITUS: That is all I wanted.

THE COURT: While you are up here, in view of your position (113)
in this case, I had prepared a verdict of the three verdicts—guilty,
verdict of.. not guilty or not guilty by reason of insanity, but it strikes me,
in view of your consistent position, I should only have the two
verdicts—guilty or not guilty by reason of insanity.

MR. AHERN: I think perhaps it would be proper, because we have
almost entered a plea of guilty as far as the crime is concerned.

THE COURT: So you would suggest just the two verdicts?

MR. AHERN: I would, your Honor.

THE COURT: All right.

(Open Court:)

THE COURT: In view of the objection here by the Government, (114)
I should explain to the jury that under a recent ruling by the Court
of Appeals—we won't charge your time on this for your argument—

MR. AHERN: Thank you, your Honor.

THE COURT: Due to a recent ruling by the Court of Appeals the
Government is not able to call as a witness here any psychiatrist
from the Saint Elizabeth's Hospital who treated and examined the
defendant while he was in Saint Elizabeth's Hospital, because that is
considered privileged and therefore the Government is barred from
calling before you such a psychiatrist.

The only psychiatrist the Government could call would be one who
would make an examination of the defendant for the purpose of testify-
ing at the trial here as to any opinion he might have as to his
mental condition at the time of the alleged robbery.

You may proceed.

MR. AHERN: Ladies and gentlemen, as I was saying, has there been
one psychiatrist introduced here by the Government who would con-
tradict the method of examination of Doctor Gilbert?

Now, Mr. Titus says there is another way to do it, and apparently
he knows the way. None of us knows it, and apparently none of the
psychiatrists know it. But he hasn't brought one man into this (115)
court to testify there was anything wrong with way Doctor Gilbert
examined this man.

Now, I don't know whether he means what he says but I gather
that he thinks Doctor Gilbert is lying. I am really surprised and a little
hurt that Mr. Titus would say that, because I don't think he really
believes it. I don't think he means what he says.

He has known Doctor Gilbert long enough. We have all known Doctor Gilbert long enough. He is one of the most eminent psychiatrists in this town; and I really don't think Mr. Titus means what he said. (115)

He distorts things just a little bit more by saying "These two pages". Well, actually there were two pages but there were four pages of writing. So Mr. Titus again attempts to distort and mislead you ladies and gentlemen.

And remember this, and I ask you to remember it in your deliberations: Why did this man sit at Saint Elizabeth's being treated for one and one-half years?

They are not going to keep you over there if there is nothing wrong with you. They have methods of examination, and you don't sit over there for one and a half years unless there is something wrong with you.

Mr. Titus again attempts to distort the facts. He said that the defendant told the doctor he was having delusions. Now, if you remember, the doctor said "He didn't tell me he was having delusions." (116)

He said "From the things that he told me, those things constituted delusions."

So, in almost every instance he has attempted to mislead you ladies and gentlemen. He has attempted to substitute his knowledge of psychiatry for that of a man who has been in the field longer than Mr. Titus has been living.

Now, there has been evidence introduced in this case of insanity. It is therefore incumbent upon the government to show you ladies and gentlemen beyond a reasonable doubt that this man is of sound mind, and the only way you are going to reach that conclusion by Mr. Titus is by Mr. Titus' deductions from a man who said he studied two years in psychology, and only takes ten minutes to tell whether a person is of sound or unsound mind.

Mr. Titus would have you believe that five hours was not enough for the doctor, but perhaps ten minutes is enough for this self-styled expert he had on the stand.

So we are not asking you to let this man walk out of the court room as Mr. Titus would have you believe. We are not asking you to do that at all. And I hope Mr. Titus might be able to explain to you ladies and gentlemen how a person who is as sound as he said this man is, would be in Saint Elizabeth's Hospital, fooling all the psychiatrists--everybody is being fooled except Mr. Titus. (117)

You have the facts ladies and gentlemen. I know you will reach the proper decision.

BY MR. TITUS

MR. TITUS: May it please the Court:

I am glad, ladies and gentlemen of the jury, that my good friend, Mr. Ahern, whom I have known for a number of years as well, says that Mr. Titus has known Doctor Gilbert long enough, that he has been around here.

That is true, I have known him for a good long period of time, and I am glad I know him because I can speak from experience.

Ladies and gentlemen of the jury, I don't attempt in one word to distort this testimony. I resent that and I think Mr. Ahern doesn't believe that, either.

I am trying to ask where the common sense in this case is.

Mr. Ahern asked me a question. I am going to try to answer it—indirectly he asked it.

He said, "How could a man as sound as this defendant remain at Saint Elizabeth's for a year and a half?" I think Mr. Ahern knows the answer to that, and I think you know the answer to that. I am not saying—and I don't intend to say—that I don't think this man had a mental disorder or a disease. What I am saying is that I don't believe and I don't think you believe from your experience in seeing psychiatrists, that a psychiatrist can say three months ago he had a mental disease—but that is not all—that was a causal connection between that disease and the crime. I don't think any psychiatrist is going to say that, and as to the length of time at Saint Elizabeth's. (118)

You know and I know an institution of that size takes a person in after a person has gone through an examination by two other psychiatrists who have found him or her to be of unsound mind.

They are not simply going to release that person until they have made a thorough and complete investigation to determine whether that original analysis based upon two short examinations—and you know what Doctor Gilbert does on those examinations—was true or correct.

That is the answer to that problem and I am glad to try to explain it, and I think Mr. Ahern knows the answer. But he says I tried to distort the facts.

And he says do I know more than this man who has had thirty years of experience. The answer to that is in Mr. Ahern's own argument. I have known Doctor Gilbert for at least four to five years; and I am not going to say any more.

Ladies and gentlemen of the jury, I ask you this:

(119)

The court has explained what position the Government is in under the law. I am not going to comment further on that, because that is self-explanatory.

But I am going to say to you, ladies and gentlemen of the jury, there was no self-appointed expert in Mr. McGrevy. He was a man who was robbed at the point of a gun. He saw and he heard what he told you. He said that—not in response to my question, but the defense counsel, who I am convinced was a little bit shocked when he asked the question and got the answer—he said, "What experience have you had in psychiatry?" He said "None, but I have had two years as a psychology student at college."

And all he was doing was telling you did this man act in a normal manner when he saw him, and who had a better chance to see him under the conditions on September 11th? And the officer saw him on September 11th, and he made his statement on September 11th. And, ladies and gentlemen, they can judge just like you can judge, and if this person committed this crime because of insanity, do you think that somewhere along the line between the time of the robbery and the time that the police questioned him, that something of that lack of memory, this disorientation, this confused thinking—do you think they would have noticed some of that? (120)

THE CLERK: Your time is up, Mr. Titus.

MR. TITUS: I will leave it in your hands.

JUDGE'S CHARGE TO THE JURY

THE COURT: (Youngdahl, J.): Ladies and gentlemen of the jury, the time has come now when it is incumbent upon the Court to instruct the jury as to the principles of law that you must apply to the facts as you find them to be, to determine what verdict you shall bring in in this case.

Each of us has certain duties and responsibilities to perform in the trial of a case of this kind, and counsel for the most part have performed their responsibilities except what they may have to say to the Court at the conclusion of the Court's charge.

They have just summed up their cases before you. It is proper for you to give attention, as you did, to their arguments but you will always appreciate the fact that arguments of counsel in no way constitute evidence and you must rely solely upon the evidence and testimony here if there is any conflict in the statements made by either counsel. That also applies as far as that goes to any statement the Court might make.

You are the exclusive judges of the facts. It would not be proper (121)
for me to tell you how to decide this case, nor would it be proper for me
to try to, by the tone of my voice, or by anything else that I said, to in-
fluence you in your judgment.

I am anxious that you have that responsibility free from any such im-
pression on the part of the Court.

On the other hand, you must accept the law exactly as the Court gives it
to you, regardless of any opinion that you may have as to what the law is or
what it ought to be; you must accept the law exactly as the court states it
to be.

Now because you are the exclusive judges of the facts, ladies and gentle-
men of the jury, it will be your responsibility to determine what weight and
credibility you will give to the testimony of these various witnesses who
have appeared before you. And there are certain common-sense tests that you
have often applied in your everyday experiences in determining where the
truth of a particular situation really was, that you should likewise apply
to the testimony here to determine just what the facts are; and what credit
you will give to this testimony.

You will consider, for example, so far as you are able to do so, the
manner, conduct, and demeanor of each witness who has testified; his memory
or lack of memory; and of course when I use the pronoun, "he" I mean (122)
"his" or "her"; the faculty or lack of faculty of each witness to see and
hear those things about which he has testified; the ability or lack of ability
of each witness to convey to you through the medium of words what he has seen
or heard; the probability or improbability of the truth of testimony given
by the witness; the reasonableness or unreasonableness of the story; any bias
or prejudice shown by a witness which might have influenced his judgment or
colored his testimony; and all those other factors, including interest in
the outcome of the case which you, as intelligent and experienced people take
into consideration when you determine the difference between truth and un-
truth or truth and half-truth; and if in your opinion any witness has in this
trial testified willfully falsely or corruptly with reference to any material
fact concerning which the witness could not possibly have been mistaken; you
are at liberty, if you deem it wise to do so, to disregard the entire testi-
mony of that witness or any part of the witness' testimony, except as it has
been corroborated by credible witnesses or by facts and circumstances estab-
lished by the evidence in this case.

You are the fact-finding branch of this court, members of the jury, (122) and you must not let sympathy or prejudice or passion influence your judgment in any manner whatever.

You must reach your judgment on the facts as disclosed by the (123) evidence, adduced in open court, and inferences which are reasonably deducible therefrom, but you are not to speculate, conjecture, or guess.

Now, the defendant Charles W. Douglas has been on trial before this court on the charge of robbery under an indictment which reads, "The Grand Jury charges on or about September 11, 1952, within the District of Columbia, Charles W. Douglas, by force and violence and against resistance and by sudden and stealthy seizure and snatching, and by putting in fear, stole and took from the person and from the immediate actual possession of Leo McGrevy, the property of Corin H. Oslanian, of the value of about nine dollars, consisting of the following, nine dollars in money."

To this indictment the defendant has entered a plea of not guilty and thus puts in issue each and every essential allegation thereof.

Now, the mere fact that a defendant has been indicted and is charged with a crime does not amount to evidence of guilt and is not to be taken as an indication of guilt because an indictment is merely the procedure and the machinery by which the defendant is brought before the court and is placed on trial.

It is a rule of law that every defendant in a criminal case is (124) presumed to be innocent, and this presumption of innocence relates to every essential element of the offense, and attaches to him throughout the trial until overcome by legal evidence which establishes his guilt beyond a reasonable doubt.

It is also the law that the burden of proof is upon the government to prove the defendant guilty beyond a reasonable doubt.

Now, proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It does mean proof to a moral certainty and not necessarily proof to an absolute or mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason and not on just some speculation or conjecture. If after an impartial consideration of all the evidence you can say to yourselves that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. If the evidence is as consistent with innocence as with guilt, or if the government has merely proved that there is a strong probability that the fact charged is true, then the Government has not sustained this burden.

But, on the other hand, if after such impartial consideration of (124)
all the evidence, you can say to yourselves truthfully and candidly that
you have an abiding conviction of the defendant's guilt, such as you (125)
would be willing to act upon in the more weighty and important matters per-
taining to your own affairs, then you have no reasonable doubt.

Now, the District of Columbia Code under which this indictment is brought,
defining robbery, reads:

"Whoever by force or violence, whether against resistance or by
sudden or stealthy seizure or snatching, or by putting in fear, shall
take from the person or immediate actual possession of another anything
of value, is guilty of robbery".

Very briefly, the Government contends that on September 11th, 1952,
Defendant entered the Court Hotel at 410 Sixth Street Northwest in the District
of Columbia and robbed the night manager of the hotel, with the use of a
revolver, and he secured eight or nine dollars in money, six dollars of which
was hotel money and the rest belonged to the hotel manager.

The government asserts that the defendant forced the night manager into
a parlor and threatened to kill him if he called the police.

Defendant asserts that he was of unsound mind at the time of the alleged
offense and therefore should be found not guilty by reason of insanity.

The Government denies this and contends that whatever the mental con-
dition of the defendant may have been on prior occasions, he was of (126)
sound mind when the alleged offense was committed.

Now, members of the jury, when lack of mental capacity is raised as a
defense to a charge of crime, the law accepts the general experience of man-
kind and presumes that all people, including those accused of crime, are sane.

As soon as some evidence of mental disorder is introduced it is incumbent
order....
upon the government that sanity, like any other fact, must be proved beyond a
reasonable doubt as a part of the prosecution's case.

An accused is not criminally responsible if his unlawful act was a product
of mental disease or mental defect. Disease is used in the sense of a condition
which is considered capable of either improving or deteriorating. Defect is
used in the sense of a condition which is not considered capable of either
improving or deteriorating and which may be congenital or the result of injury
or residual effect of physical or mental fatigue.

If you, the jury, believe beyond a reasonable doubt that the accused was
not suffering from a diseased or defective mental condition at the time he
committed the criminal act charged you may find him guilty.

If you believe he was suffering from a disease or defective mental (126) condition when he committed the act, but believe beyond a reasonable (127) doubt that the act was not the product of such mental abnormality, you may find him guilty.

Unless you believe beyond a reasonable doubt either that he was not suffering from a disease or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity.

Thus your task would not be completed upon the finding if you did find that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act.

These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case.

When an accused person is found not guilty by reason of insanity, he will be presumed to be insane and may be confined in the hospital for the insane as long as the public safety and his welfare require.

Now, there has been an expert witness in this case, Doctor Gilbert. And the court charges you that a person who by education, study, and experience, has become an expert in any art, science, or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should give careful (128) consideration to the opinion expressed in connection with other evidence in the case, and you should weigh the reasons, if any, given for such opinion.

You are not bound however, by such an opinion. You may give it such weight as you deem it is entitled to receive; whether that be great or slight; or you may reject it, if in your judgment the reasons given for it are unsound.

Now, the defendant has seen fit not to take the stand in his behalf to testify in this case. The defendant in a criminal case, under our law, has the option whether or not he should take the witness stand. He has the privilege of taking the witness stand if he chooses to do so. He is under no obligation to testify if he chooses not to do so, and the law is that a jury must not draw any unfavorable inference against the defendant from the fact that he has failed to take the witness stand.

It is also the law that if a witness is not produced who is peculiarly available to one side or the other, then the jury has the right, if it wishes to do so, and it is entirely within the jury's discretion, to draw the inference that the testimony of that witness would be unfavorable to the party who has failed to call the witness, unless the absence of the witness is sufficiently accounted for or explained. (128)

No unfavorable presumption can be drawn against either the prosecution or defendant by reason of failure to call certain witnesses where such witnesses are equally available to both sides. (129)

Now, just one form of verdict will be submitted to you which has a blank space for you to write in either the word, "Guilty" or the words, "Not Guilty By Reason of Insanity."

After you have written the words which you find should be inserted, you will have the verdict signed by your foreman or forewoman, have it dated, and returned to this court.

Finally, members of the jury, in arriving at your verdict you will use the same practical approach, the same common sense and intelligence that you employ in any important matter in your everyday experiences. Your verdict must be unanimous, of course.

On reaching the jury room you will first select a foreman or forewoman from among yourselves, who will preside over your deliberations in the jury room and speak for you when you return your verdict to the court.

Then you will proceed to reach a verdict impartially, without sympathy, passion, prejudice, or emotion of any kind one way or the other.

Anything further? (130)

MR. TITUS: Nothing further.

MR. AHERN: I have nothing, your Honor.

V E R D I C T

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes.

THE CLERK: The jury will please rise.

The United States of America versus Charles W. Douglas, Criminal Case Number 1547-52:

"We, the jury, find the defendant Charles W. Douglas, Guilty."

Signed, "George L. King, Foreman", dated May 24, 1955.

Members of the jury, that is your verdict, so say you, each and all? (131)

(Affirmative nods.)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 9 1956

No. 12,795

Joseph W. Stewart
CLERK

CHARLES W. DOUGLAS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12,879

CHARLES W. DOUGLAS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

LEO A. ROVER,

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LEWIS CARROLL,
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Assistant United States Attorneys.

STATEMENT OF QUESTIONS PRESENTED

1. (a) May the issue of the moral responsibility of the accused be taken from the jury?

(b) Was the evidence adequate to support the jury's determination that appellant could not be found not guilty by reason of insanity?

2. Are instructions on mental disease or defect and on causation framed in the language of the *Durham* opinion proper?

3. May the prosecutor comment with reasonable latitude upon the inferences drawn from the evidence?

4. Should the appellate court sustain a judgment of conviction where Government psychiatric testimony was not prejudicial to appellant, did not necessarily violate the rule of the *Taylor* case, and would be admissible on a retrial?

5. Is a variance between indictment and proof as to ownership of the stolen property material in a robbery case?

6. Does trial counsel have such control over trial tactics that judgment decisions made by him will not result in his being stigmatized as incompetent?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,795

CHARLES W. DOUGLAS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12,879

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v.

UNITED STATES OF AMERICA, APPELLEE

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASES

No. 12,795

On October 6, 1952, appellant was indicted in Criminal No. 1546-52 for robbery in violation of Section 22-2901 of the District of Columbia Code, in that on September 11, 1952, he robbed from the person and from the immediate actual possession of one Elwood Slack \$91.00, the property of George C. Clark and Louise E. Clark (1 App. 50).¹ On

¹ This case on appeal involves two convictions and two Joint Appendices. In this brief the Joint Appendix dealing with No.

October 14, 1952, appellant pleaded not guilty (1 App. 51). Upon his petition for a lunacy inquiry he was found to be of unsound mind on December 19, 1952 (1 App. 52). In July 1952, a certificate of restoration to sanity signed by Dr. Overholser was filed in District Court (2 App. 2-3), and, upon a motion for judicial determination of the mental competency of appellant to stand trial, a hearing was had at the conclusion of which appellant was found to be of sound mind, mentally competent and able to assist in his own defense and he was ordered to stand trial (1 App. 53). Trial was begun on November 29, 1954, before Judge Letts, and the following testimony was adduced.

Elwood Slack, night manager at the Ebbitt Hotel, 10th and H Streets, N. W., Washington, D. C., testified that at about 3:00 a. m. on September 11, 1952, appellant entered the hotel, requesting a room. Mr. Slack informed him that the hotel was filled and appellant appeared to leave. However, the witness soon saw appellant returning with a bellboy by the name of Thomas in front of him. Appellant said "Let me have the money or I'll kill this guy" (1 App. 2), and then directed Slack to place the money on the counter. The witness did as he was told, handed over \$91.00, which appellant scooped up and put in his pocket (1 App. 2). All of this time appellant had a gun in the bellboy's back. When he had obtained possession of the money, appellant left by the 10th Street door of the hotel. As soon as appellant had departed the police were called.

Slack identified the robber as the defendant who was present in the courtroom, and he indicated that the gun marked for identification at the trial appeared to be the same color and shape as the gun used during the robbery (1 App. 4).

In reply to further questions, the witness stated that the money was taken from his custody and that it belonged to

12,795 (Crim. No. 1546-52) will be referred to as "1 App." and the Joint Appendix dealing with No. 12,879 (Crim. No. 1547-52) will be referred to as "2 App." Likewise, record pages will be referred to as "1 R." and "2 R." respectively.

the hotel, which hotel was owned jointly by George C. Clark and Louise Clark (1 App. 4).

William Thomas, 3764 A Street, N. E., bellboy at the Ebbitt Hotel, corroborated Slack's testimony with respect to the robbery. He testified further that appellant directed him to go to the desk and ask the clerk for money; that he did as he was told; and that after appellant had secured the money he told the two men to keep their backs facing towards the wall and not to say anything until he had gone away (1 App. 6). After appellant had left, the witness ran outside and informed a nearby police officer of the incident. He saw appellant again after his arrest which took place 10-15 minutes after the robbery, and again the next morning in the robbery squad precinct. He, too, identified appellant in the courtroom (1 App. 7).

Robert N. Foright, Metropolitan Police Department, arrested appellant at 15th and K Streets, N. W., at about 3:30 a. m. on September 11, 1952, in response to a flash lookout concerning the Ebbitt Hotel robbery (1 App. 9). Appellant at the time was alone in an automobile driving north on 15th Street. When Officer Foright opened the door appellant asked the officer what he wanted, mention was made of the robbery, and, several of the bills being in plain view, appellant claimed that they were his property (1 App. 10). Upon a search of appellant, more money was found.

Then the witness testified concerning the confession made by appellant and the fact that it was made voluntarily (1 App. 11). That confession, corroborating the story of Slack and Thomas, was read to the jury (1 App. 12-13).

John S. Hughes, Metropolitan Police Department, testified that he was called to the scene of the arrest, that he searched appellant, and found on him a revolver (which was introduced at the trial). He further stated that appellant, at about 4:00 a. m. on September 11, admitted the Ebbitt Hotel robbery (1 App. 14).

The prosecutor stated that Sgts. Deenehan and Apperti would be available as corroborating witnesses (1 App. 14), and rested the Government's case.

On behalf of the appellant, *Mae Price*, 2536—13th Street,

N. W., sister of the appellant, testified that appellant had lived with her for about three years in the 1949 or 1950 to 1952 period. During 1952 the witness had occasion to notice that appellant had severe headaches, and that he used to pull his hair and hit his head against the wall as if in severe pain (1 App. 15). In March of 1952 appellant tried to commit suicide by hooking up a radio to water in the bathtub (1 App. 15); about two weeks later he again attempted suicide by turning on the gas (1 App. 16); and he tried suicide a third time by putting a rope around his neck and tying it to a basement pipe (1 App. 16). The witness did not actually see the rope but she saw marks on appellant's neck and also on the pipe (1 App. 16). Again several weeks later, the witness saw appellant lying asleep on a couch with a butcher knife nearby (1 App. 17). She wrote to the Veterans' Administration about appellant and tried to get him to go there because she believed he was suffering from a mental condition. In April or May of 1952, appellant, while playing cards became hysterical, and offered to strike her (1 App. 18); and another time he tried to use a gun for "Russian Roulette" (1 App. 18). She did not observe this last incident but it was told to her by her brother.

On cross examination, Mrs. Price stated that at the time the alleged incidents occurred, three sons, and a daughter-in-law were living with her (1 R. 39, 44). Other persons were living on the first, second, and third floors of the house (1 R. 45). When questioned further about the attempted bathtub-suicide, she stated that appellant was not in the tub at the time but getting ready to get in (1 R. 47). She did not tell her son about the matter but she did tell her daughter-in-law (1 R. 48-9). The daughter-in-law did not come in to observe the incident because she was trying to get her little girl to sleep (1 R. 49). The witness did not call appellant's employer and she let appellant go to work in spite of the suicide attempt (1 R. 50-1). Nor did she call the family physician (1 R. 53-4). She notified no one (1 R. 55). Her two sons and her daughter-in-law were in the house at the time appellant attempted suicide by gas, but she did not tell them until the next morning (1 R. 55, 57).

She did not herself observe the attempt to commit suicide by hanging but learned about it from her brother Everett (1 R. 60). She did not tell any of her neighbors about it (1 R. 62).

The witness testified that she had never seen appellant with a gun (1 R. 66). When she questioned appellant about the suicide attempts he said he did not want her to know anything about it (1 R. 69).

On redirect and recross examination it was brought out that her daughter-in-law was sick at the time of the trial; that a man to whom she told the story was working; and that she would be unable to locate her son Donald until after 4:30 p. m. on the first day of the trial (1 R. 71-4). None of these persons were called as witnesses.

Dr. Amino Perretti, clinical director of psychiatry at the D. C. General Hospital, testified that he examined appellant in 1952 at the request of the court. He examined appellant on two different occasions but recalled his conclusion after the first examination, December 7, 1952, that appellant was of unsound mind, suffering from schizophrenia or dementia praecox. The symptoms consisted of the presence of delusions, hallucinations, confusion, depression, and stupor (1 App. 19). In his opinion this psychosis developed gradually; this was based on the fact that appellant had paranoid ideas of persecution which he believed to have been going on for some time (1 R. 76). At the time of the December examination appellant appeared disorientated in that he did not know where he was. The witness could not definitely establish the period of time over which appellant's condition would develop to reach the stage it had at the time of the examination, but he stated "I believe that as far as I can ascertain by reviewing the case that had been going on for some time, quite a number of months, I thought," and upon the further questioning "You'd say it went back as far as September," he replied "That is right" (1 App. 19).

On cross examination the doctor stated that he believed the first examination took more than ten minutes (1 App. 20), but he could not state whether it took more than half

an hour (1 App. 21). He indicated that schizophrenia of the paranoid type that would resort to violence "may" not be violent (1 App. 20). The witness was shown the statement appellant had given the police, and he felt that from that statement it appeared that appellant was not disorientated at that time (1 App. 22). He sent in his report to the court after the very first examination of appellant (1 App. 24). He had no information upon which to base his diagnosis except what information appellant himself had given him (1 App. 24) and he believed what appellant told him about delusions (1 App. 24). Everything the witness learned about appellant's background came from appellant (1 R. 89). Upon being further questioned as to how far back this particular illness went, the witness replied "It is undetermined" (1 R. 92) but probably had been going on for many months (1 R. 93). He based his opinion as to the length of time the illness had been going on primarily upon what appellant told him but also upon his interpretation of the symptoms (1 R. 93). He based his conclusions upon what appellant said (1 R. 95). On recross examination, Dr. Perretti said that he was unable to find his notes on appellant (1 R. 98).

Dr. Joseph L. Gilbert, chief of the psychiatric service center, St. Elizabeth's Hospital, testified that he examined appellant on December 6 and December 13, 1952, and arrived at the opinion that appellant was suffering from dementia praecox (1 App. 25). He based this conclusion upon the fact that appellant was confused and disorientated and showed signs of blocking and interference with thinking. Appellant exhibited signs of a persecution complex, hallucinations, delusions. The information concerning appellant's background was obtained from appellant himself (1 App. 26). He had no recollection of speaking to anyone else about appellant (1 App. 26). He believed that appellant had been suffering from a mental disease or defect prior to December 1952 for at least several years, apparently because "He stated it began while he was still in the Navy" (1 App. 26).

On cross examination, Dr. Gilbert appeared confused as

to what notes he had with respect to appellant and at first refused to turn them over to the prosecutor (1 R. 105). He testified that appellant did not have the paranoid type of schizophrenia but rather a mixed type with some catatonic features (1 R. 108-9). The witness was familiar with the practice of talking to relatives, parents, doctors, etc. of a patient with a view to ascertaining his background but could give no reason for not doing it in the instant case unless it was that the court was in a hurry (1 R. 111).

Dr. Gilbert stated that disorientation meant that the person was not aware of time relationship or personal relationship and of his situation. Appellant told him he did not know what he was charged with and where he was (1 R. 116). Appellant knew of his occupation and schooling and was able to tell the psychiatrist about his family history and his personal history (1 R. 117-9). None of this meant that appellant was disorientated. The doctor felt able to determine whether someone was lying or not. He admitted he could be wrong in the instant case but he was of the opinion he was not. In his view the verdict of a lay jury could support a medical-legal opinion to a considerable degree (1 R. 124). Further, he was of the opinion that appellant's disease "contributed largely to" the commission of the crime (1 App. 28).

Fredolph Anderson, roomer in the apartment of Mrs. Price, for two years, until November, 1951, testified that appellant had severe headaches that seemed to bother him a lot (1 App. 28). On cross examination he stated that he did not notice the headaches until the end of his stay at the Price house (1 R. 127).

Everett Franklin Douglas, brother of appellant, testified that in 1952 he was called to his sister's home because of his brother's condition concerning headaches. The witness observed these headaches (1 App. 29). On cross examination the witness stated that he learned about the headaches from his sister and he also learned about the attempted suicide from his sister (1 R. 133). On redirect examination he stated that when home in April of 1952 he observed a rope scar around appellant's neck (1 R. 133), and on recross

he testified that he learned from his sister that the rope scar came from an attempted hanging (1 R. 134).

On rebuttal for the Government, *Officer Foright* testified that at headquarters after the arrest appellant appeared belligerent and sarcastic (1 App. 30). At one point, when appellant was asked his name he replied "You are a cop. You find out what my name is" (1 App. 30). Appellant further stated that he had got the pistol from the hallway in his sister's house (1 App. 30).

Michael J. Apperti, Metropolitan Police Department, further called in rebuttal for the Government, testified that when he first talked to appellant the latter had alcohol on his breath. Upon being questioned he at first was belligerent but later related the whole story of the holdup and the gun (1 App. 31). Further, he explained to the officers that the reason he originally did not want to answer questions was that he did not want to involve his sister and did not want her to know that he was in trouble (1 App. 31).

Dr. Leon J. Epstein, assistant chief of the West Side Service, including the Maximum Security Division, St. Elizabeth's Hospital, and also in the private practice of psychiatry, testified on behalf of the Government, that he had appellant under observation for examination and treatment while appellant was at St. Elizabeth's from January, 1953 until July, 1954 (1 App. 32). The official hospital diagnosis with which he agreed was schizophrenia reaction, paranoid type. There was some alleviation of the symptoms as time went by. The witness might have had occasion to see appellant weekly for half-hour to one-hour periods. In reply to a question as to whether he was able to form an opinion on whether appellant was suffering from a mental disease or disorder which would have caused the commission of the crime on September 11, 1952, the doctor replied that he could say rather definitely that appellant likely was a disturbed person (1 App. 33). How long this particular illness existed prior to the time the patient was seen he was unable to say (1 App. 34).

On cross examination, Dr. Epstein stated that there is a variable development period connected with schizophrenia

of the paranoid type; the groundwork for it is of a rather long period, but much of the theory with respect to schizophrenia is in a state of flux (1 App. 34).

Following closing argument on behalf of the Government (1 App. 34-40); closing argument on behalf of appellant (1 App. 41-43); and rebuttal argument on behalf of the Government (1 App. 43-46;) the jury was instructed by the trial judge (1 App. 46-50). There were no objections or suggestions to the charge (1 App. 50).

The jury found appellant guilty as charged, and on December 23, 1954, Judge Letts sentenced appellant to imprisonment for two to seven years (1 App. 54.) The Judge denied appellant's petition for leave to appeal in forma pauperis as without merit and not taken in good faith (1 R. 187) but this Court granted a petition addressed to it (1 R. 100).

No. 12,879

On October 6, 1952, appellant was indicted in Criminal Number 1547-52 for robbery in violation of Section 22-2901 of the District of Columbia Code, in that on September 11, 1952, he robbed from the person and from the immediate actual possession of one Leo McGreevy \$9.00, the property of Khoren H. Aslanian (2 App. 1). On October 10, 1952, appellant pleaded not guilty (2 App. 1). Upon his petition for a lunacy inquiry he was found to be of unsound mind (see above, and 2 App. 2). On July 20, 1954, a certificate signed by Dr. Overholser, Superintendent of St. Elizabeth's Hospital, was filed in District Court, certifying that appellant was now of sound mind (2 App. 2-3). As indicated above, after a hearing a judicial determination was made that appellant was of sound mind and mentally competent to assist in his own defense, and he was ordered to stand trial (1 App. 53). Trial was had on May 23, 1955, before Judge Youngdahl, and the following testimony was adduced.

Leo McGreevy, night manager at the Court Hotel, 410 6th Street, N. W., Washington, D. C., testified that at about 3:00 a. m. on September 11, 1952, a neatly-dressed young man, who turned out to be appellant, asked for a room. While some colloquy was being had with regard to rooms,

appellant walked around the desk, stuck a revolver in the witness' side and said "I want all your money" (2 App. 6). He further stated "Give me your money, all your money, or I will kill you" (2 App. 6). The witness handed his wallet to appellant, pleading with him to return the wallet itself which had a sentimental value. Appellant took the money out and left the wallet on top of the desk (2 App. 6). The witness estimated that there were six dollars of hotel money in the wallet and two to four dollars of his own (2 App. 6). After appellant had taken the money, he ordered the witness into the adjoining parlor; then he felt to see whether there was a lock on the door so he could lock the witness in, but there being no lock he merely pulled it shut. Before that, he had told Mr. McGrevy not to call the police because they couldn't catch him anyway, and that if he called the police appellant would come back and kill him (2 App. 7). The witness remained in the parlor, for a few minutes there was silence, then appellant walked out. The witness waited a few more minutes and finally telephoned the police (2 App. 7).

He observed appellant for about ten minutes at the time of the robbery. He "sized him up as well as I could, because I figured that it was a good thing to know" (2 App. 9). The witness was asked whether appellant appeared to be acting in any abnormal or unusual manner, to which he replied, "Well no; nothing abnormal, only that he was robbing me at gunpoint and he had a gun there, and of course that for me was abnormal," and again, the fact that he was robbing him "Was an abnormalcy to me, but I wouldn't say there was anything abnormal in his conduct. So far as carrying on a robbery is concerned, I suppose that is the normal way they go about robbing with a gun" (2 App. 9). In his opinion there were "no indications of insanity" but he surmised that appellant had been drinking a little, without actually being intoxicated (2 App. 9). The witness identified the gun used in the robbery (2 App. 10).

On cross-examination, Mr. McGrevy testified that while he had had no training in psychiatry, he had studied psychology for two years in college (2 App. 11). It was his view that

in the case of a robbery he could tell whether it was a sane man or a crazy man who was holding him up (2 App. 11).

Robert N. Foright, Metropolitan Police Department, essentially repeated the testimony he gave with regard to the arrest at the trial of No. 12,795 (2 App. 12-13). He further testified that from the time he first observed appellant until the time he completed his part of the investigation of the case, appellant did not act in an unusual, insane, or unnatural manner, but merely with the belligerence normal to anyone just placed under arrest (2 App. 13). Appellant did nothing and said nothing which would give the officer the impression that he was of unsound mind at the time he was under the officer's observation (2 App. 14). On cross-examination, the witness conceded that he had no degree in the field of psychiatry and that he was not observing appellant for the purpose of determining whether he was of sound or unsound mind (2 App. 14).

Michael J. Upperti, Metropolitan Police Department, testified that he questioned appellant with regard to the robbery at the Court Hotel, and that in the course of the questioning appellant made a statement which was reduced to writing and signed by appellant. The statement was made voluntarily, without threats, coercion, or promises. The statement was read to the jury. It corroborated Mr. McGrevy's version of the holdup (2 App. 16). During the time the witness observed appellant, the latter did and said nothing which would give the impression that he was of unsound mind. At first he refused to answer questions and was slightly belligerent but after a while he calmed down and talked just as normally as any other person would (2 App. 16). Appellant was fully aware of what he was doing and he indicated by no sign or action that he was suffering from any delusion or that he did not know what he was doing (2 App. 17). With that, the Government concluded its case.

Mae Price, appellant's sister, in the main repeated the testimony she had given at the trial of No. 12,795 (2 App. 17-19). On cross examination, the witness was not very positive about the date of the suicide attempts or the se-

quence of events (2 R. 82-3). With respect to the gas incident, she did not know whether appellant had been trying to commit suicide; he might have been doing it to scare her (2 R. 89). About July of 1952, appellant moved out of her apartment into a rooming house. She never told the new landlady about the three suicide attempts because she "figured he would probably be all right" (2 R. 95). She never gave her counsel the address of her son Gordon because he was asleep on every one of the three suicide attempts; she never woke him up (2 R. 96). Her brother Everett was supposed to leave for overseas the day of the trial or the next day (2 R. 96).

Dr. Joseph L. Gilbert essentially repeated the testimony he gave at the trial of No. 12,795 (2 App. 19-21). In addition, he testified that he "would say there was a causal connection between the mental disorder and the condition" and that "From the symptoms present I would think there was a very definite causal relation" between the act and the disease (2 App. 22). In his opinion appellant was not malingering (2 App. 22). On cross-examination it became apparent that the witness' notes with respect to appellant were incomplete (2 R. 62-5). He did not determine whether the answers given by appellant during his examination of him were true since he considered that to be "immaterial in so far as the symptoms were concerned" (2 R. 65).

Following argument on behalf of the Government (2 App. 24-28); closing argument on behalf of the appellant (2 App. 29-32); and closing argument on behalf of the Government (2 App. 33-34); the court instructed the jury (2 App. 34-39). There were no objections or suggestions to the charge (2 App. 39).

The jury found the appellant guilty as charged (2 App. 39) and on June 16, 1955, Judge Youngdahl sentenced appellant to imprisonment for eighteen months to seven years (2 App. 4).

The District Court denied appellant's petition for leave to proceed in forma pauperis (2 R. 9), but forma pauperis was granted by this Court (2 R. 10).

STATUTES INVOLVED

Title 14, District of Columbia Code, Section 308 provides:

In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him; *Provided*. That this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon a human being, and the disclosure shall be required in the interests of public justice.

Title 22, District of Columbia Code, Section 2901 provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Public Law 313, 84th Congress, Chapter 673, approved August 9, 1955, provides in part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 927 of the Act entitled "An Act to establish a code of law for the District of Columbia," approved March 3, 1901, as amended (sec. 24-301, D.C. Code, 1951 edition), is amended to read as follows:

* * * * *

"Sec. 927.

* * * * *

"(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

"(d) If any person tried upon an indictment or information was an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

* * * * *

Sec. 4. The Act entitled "An Act relating to the testimony of physicians in the courts of the District of Columbia," received by the President May 13, 1896 (29 Stat. 138; sec. 14-308, D. C. Code, 1951 edition), is amended to read as follows:

"That in the courts of the District of Columbia no physican or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him: *Provided*, That this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon a human being, and the disclosures shall be required in the interests of public justice: *Provided further*, That this section shall not apply to evidence relating to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity, or in the pretrial or posttrial pro-

ceedings involving any criminal case where a question arises concerning the mental condition of an accused or convicted person."

SUMMARY OF ARGUMENT

A judgment of acquittal on the ground of insanity was improper for the reason that the issue of moral responsibility of the accused is a jury issue which seldom, if ever, can be taken from that body. *Holloway v. United States*, 80 U. S. App. D. C. 3. Moreover, no motions for judgment of acquittal were made below, and even if they had been made, they would properly have been denied, for the evidence here was such that the jury reasonably could decide the insanity issue adversely to appellant. This is true particularly since the defense testimony was non-binding and could be considered non-credible, both inherently and in fact, where ample circumstances pointed to appellant's sanity.

The instructions of the court on the insanity problem closely adhered to instructions suggested by this Court in the *Durham* case, and were not erroneous. The closing arguments of the prosecutor were fairly innocuous and by no stretch of the imagination could they constitute grounds for reversal of the convictions.

The admission of Government psychiatric testimony in one of the cases did not constitute error under the *Taylor* rule and clearly not under present statutory standards. Moreover, such testimony was not prejudicial to appellant.

A variance between indictment and proof as to ownership of the property stolen is not material in a robbery case.

Appellant's counsel at the second trial was not incompetent; his failure to call certain witnesses was justifiable as trial tactics.

ARGUMENT

I

Appellant Was Not Entitled to Judgments of Acquittal on the Ground of Insanity

Appellant argues that the trial judges should have entered judgments of acquittal in both cases for the reason that the prosecution allegedly failed to carry its burden on the issue of the sanity of the accused. It is the Government's view that the courts below did not commit error in this regard.

A. No motions were made.

In the first place, no motions for judgment of acquittal were made at the trial. No doubt there are circumstances when an appellate court may reverse a conviction even though motions were not made below; i.e., when what occurred amounted to plain error affecting substantial rights. Rule 52(b), Federal Rules of Criminal Procedure. On the other hand, failure to afford the lower tribunal an opportunity to rule on a contention by making an appropriate motion or objection cannot simply be considered "immaterial", as appellant would have it (Brief, page 11). It would seem that appellant must carry a heavier burden in the appellate court when he has laid no basis below for the claim of error than would be his had he observed at the trial all procedural requirements. It is in the light of that factual and procedural picture that the present claim of error must be judged.

B. Judgment of acquittal by reason of insanity is improper.

Appellant's contention that a judgment of acquittal by reason of insanity should have been entered by the trial judge is unsupported by the quotation of any authority for the proposition that such a judgment may be entered by a court. And the law appears to be to the contrary.

This Court in *Holloway v. United States*, 80 U. S. App.

D. C. 3, 4-5, 148 F. 2d 665 (1945), fully set forth the legal and philosophical obstacles which prevent the result sought by appellant here from being reached, when it stated:

* * * It is argued that the facts in this case are such that no jury could convict if it properly followed such an instruction.

Had there been an equivalent conflict of testimony about the actual commission of the offense it might well be that the verdict could not stand. But the issue of the criminal responsibility of a defendant suffering from mental disease is not an issue of fact in the same sense as the commission of the offense. The ordinary test of criminal responsibility is whether defendant could tell right from wrong. A slightly broader test is whether his reason had ceased to have dominion of his mind to such an extent that his will was controlled, not by rational thought, but by mental disease. The application of these tests, however they are phrased, to a borderline case can be nothing more than a moral judgment that it is just or unjust to blame the defendant for what he did. Legal tests of criminal insanity are not and cannot be the result of scientific analysis or objective judgment. There is no objective standard by which such a judgment of an admittedly abnormal offender can be measured. They must be based on the instinctive sense of justice of ordinary men. This sense of justice assumes that there is a faculty called reason which is separate and apart from instinct, emotion and impulse, that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts. This ordinary sense of justice still operates in terms of punishment. To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.

The modern science of psychology is concerned with

diagnosis and therapeutics and not with moral judgments. It proceeds on an entirely different set of assumptions. It does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go. The tendency of psychiatry is to regard what ordinary men call reasoning as a rationalization of behavior rather than the real cause of behavior. From this point of view psychiatrists probe behind what ordinary men call the "reasoning" of an abnormal personality. This tends to restrict the area of moral judgment to an extent that offends our traditional idea that an offender who can talk and think in rational terms is morally responsible for what he does.

And so it is that when psychiatrists attempt on the witness stand to reconcile the therapeutic standards of their own art with the moral judgment of the criminal law they become confused. Thus it is common to find groups of distinguished scientists of the mind testifying on both sides and in all directions with positiveness and conviction. This is not because they are unreliable or because those who testify on one side are more skillful or learned than those who testify on the other. It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane.

* * * * *

A complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible. The purposes are different; the

assumptions behind the two standards are different. For that reason the principal function of a psychiatrist who testifies on the mental state of an abnormal offender is to inform the jury of the character of his mental disease. The psychiatrist's moral judgment reached on the basis of his observations is relevant. But it cannot bind the jury except within broad limits. To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do.

The institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men. These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion. Psychiatry offers us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that the verdict shocks the conscience of the court. (Footnotes omitted).

It may be countered that the right-wrong test, to which *Holloway* refers, has been superseded in this jurisdiction by the *Durham* rule,² and that, as a consequence, the *Holloway* statement may no longer retain its original force. But the *Durham* opinion itself refers to the *Holloway* principle and specifically reaffirms that the ultimate question of fact of insanity or sanity is still being left to the jury upon the moral judgment principle, 94 U. S. App. D. C. at 242, that is, upon the principle that the jury alone can and must make the moral judgment involved in the weighing of the degree of moral responsibility to an individual prosecuted for crime. Moreover, even if *Durham* did not contain that express affirmation, it would be evident

² *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954).

that the timeless principles of *Holloway* must continue to be guiding principles in the courts of this country.

The jury in the instant case, therefore, cannot be considered bound by the judgment and the opinion, informed as it may be, of the defense psychiatrists, any more than the jury in *Holloway* was considered bound. And the jury in the instant case could no more abandon its function to render a moral judgment on the culpability of the accused—either to the experts and their lay supporters or to the court—then could the jury in *Holloway*. For, contrary to appellant's evident conception, this judgment of the jury connoted something quite different from the fact-finding that is involved in the usual criminal case, where the court may simply add up the factual evidence adduced by the two sides and then substitute its legal determination for the factual addition rendered or to be rendered by the jury in ruling on whether or not the prosecution carried its burden of proof. The opinion of the persons testifying as to the degree of moral responsibility of which the accused may be capable in view of possible mental disease or defect cannot be added up and weighed like facts making up the commission or non-commission of the actual, physical offense; for these opinions in the ultimate add up not to a sum or an aggregate of physical facts which may or may not suffice in the eyes of the law but rather to an intangible moral judgment, and their evaluation therefore cannot be taken from the jury.

Other courts, while not always as clear in direction as this Court has been in *Holloway*, have arrived at substantially similar conclusions.

In Oklahoma, the rule is (*Cunningham v. State*, 70 Okl. Cr. 131, 105 P. 2d 264, 269 (1940) that

The defense of insanity, at best, presents a question of fact for the jury; and when they have settled that question without passion or prejudice in accordance with the evidence and the instructions of the court, it is not the province of [an appellate court] to disturb the verdict of the jury.

The Supreme Court of New Mexico has held (*State v. Moore*, 42 N. M. 135, 76 P. 2d 19, 34 (1938)) that

The sanity of the accused must be proven by the state just like any other material fact. The determination of that fact from the evidence is left to the jury. It is for the jury to reach a conclusion as to the sanity or insanity of the accused. The province of the experts is to aid the jury in reaching a conclusion. Their opinions are not to be taken as conclusive. The judgments of experts or the inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive on the jury, but may be disregarded by it. 22 C. J. 728. The testimony of an expert is purely his opinion and is not testimony as to facts and is not conclusive, even when uncontradicted. * * * The jury found the defendant guilty. This was tantamount to a determination from all of the facts that the defendant at the time of the act was sane. We cannot supplant the conclusions of experts, though unanimous, which unanimity is rare, for the conclusion of the jury's verdict. The jury can reject all the testimony, and we must respect their action unless clearly erroneous.

Similarly, see decisions of the courts of Texas, *Murray v. State*, 147 Tex. Cr. R. 474, 182 S.W. 2d 475, 478 (1944); of Alabama, *McIntosh v. State*, 35 Ala. App. 536, 50 So. 2d 8 (1951); of Kentucky, *Voice v. Commonwealth*, 284 Ky. 416, 145 S.W. 2d 45 (1940); of Missouri, *State v. Barton*, — Mo. —, 255 S.W. 2d 752 (1953); and of the Eighth Federal Circuit, *McIntosh v. United States*, 176 F. 2d 514, 516 (8th Cir. 1949), *cert. denied*, 338 U. S. 876 (1949).

Further expressions of confidence in and support for the jury as the determining agent in insanity issues will be found in these decision of this Court: *Shaffer v. United States*, 24 App. D.C. 417, 437 (1904), *cert. denied*, 196 U.S. 639 (1905); *Taylor v. United States*, — U.S. App. D.C. —, 222 F. 2d 398, 404 (1955); *Stewart v. United States*, 94 U.S. App. D.C. 386, 390, 190 F. 2d 612 (1951).

In sum, it would appear that the issue of sanity or insanity is not equateable with the factual elements bearing upon the commission of the crime as such by the accused; nor is the legal ability of the trial judge or the appellate court a proper substitute for the conscience of the peers of the defendant on the uniquely moral issue of criminal responsibility. The entry of a judgment of acquittal by reason of insanity therefore would be inconsonant with historical practice based on the peculiarity of the issue.

Not only theoretical, but very practical considerations dictate such a result. Public Law 313, 84th Congress, 1st Sess., approved August 9, 1955, provides in Section 1(d) that if a person is acquitted because of insanity at the time of the commission of the offense, the trial court "shall order such person confined in a hospital for the mentally ill." A statute similar in purpose, except in that under it the trial court had discretion on whether to arrange for commitment in a mental hospital upon acquittals for insanity, was in effect prior to August, 1955. Section 24-301, District of Columbia Code, 31 Stat. 1340, as amended. Both under the old and the new law, therefore, an accused could be deprived of his liberty by commitment to a mental hospital if, after trial, a jury found him not guilty solely by reason of insanity. Upon that state of the law, appellant's view, if accepted, might result in a trial court's taking from the jury the basic issue of the defendant's guilt or innocence, and might necessarily also result in incarceration of the defendant in a mental hospital upon the sole decision of the judge. For obviously the court could hardly direct an acquittal for insanity and then fail to carry out the mandatory provisions of Section 1(d) of the Act of August 9, 1955. The undesirable consequences of such a procedure are all too apparent. Not only would verdicts of acquittal by reason of insanity be entered by judges where Congress specifically contemplated jury verdicts on such issue, but, even more importantly, the defendant would be deprived of his right to be found simply not guilty of the commission of the crime (without the appendage of "by reason of insanity"). A person who would be incarcerated in a mental hos-

pital in consequence of the anomalous procedure appellant suggests might justifiably raise a host of statutory and perhaps constitutional objections to a course of action which has the effect of depriving him of his uncontested right to outright acquittal by a jury.³

C. Judgment of acquittal by reason of insanity was inappropriate here.

If the Government is given the benefit of the favorable inferences from the evidence to which it is entitled no judgment of acquittal was in order in any event. The following factors having a bearing upon the issue of insanity were present in the cases; taking first the issue as to whether appellant could have been found to have been suffering from a mental disease or mental defect, and secondly the issue as to whether such disease, if existing, could be found to have caused the commission of the crime.

(a) The existence of disease or defect.

1. The testimony of the defense psychiatrists (Drs. Perretti and Gilbert in No. 12,795, and Dr. Gilbert alone in No. 12,879). Without any doubt, initially at least, this was the strongest evidence in support of the defense claim of insanity. Both psychiatrists testified definitely that appellant was suffering from schizophrenia at the time he was examined, and both likewise testified, though not quite as positively, that the illness probably was in existence several months earlier, about the date of the crime. However, as already indicated above, opinion evidence as to sanity or insanity is particularly subject to the infirmity inherent in the opinion evidence generally: it is not binding upon the jury and need not be accorded any weight. See *Shaffer v. United States*, *supra*; *Voice v. Commonwealth*, *supra*; *State v. Barton*, *supra*. See also, No. 12,826—*Wigfall v. United States*, — U. S. App. D. C. — (Feb. 2, 1956). For it does not concern itself with objective fact but with subjective

³ That is true particularly, where, as here, no judgment of acquittal on the ground of insanity was specifically requested below.

opinion, and as such it is in the realm of conjecture and speculation, no matter how skilled the expert may feel he is.

Moreover, the direct testimony of the psychiatrists must be heavily discounted in the instant case by the inroads made upon it during cross examination. The examinations conducted by the doctors were relatively short (*e.g.*, 1 App. 20). Neither of them had any information upon which to base his diagnosis except only what appellant himself had related (*e.g.*, 1 App. 24, 26, 1 R. 89, 95, 111). Because of that factor, Dr. Gilbert, at least, conceded that there was a possibility he might be wrong in his diagnosis (1 R. 121). There was doubt as to the correct diagnosis, Dr. Perretti emphasizing schizophrenia of the paranoid type (1 R. 76); and Dr. Gilbert indicating appellant had a mixed type of schizophrenia with some catatonic features (1 R. 108-9). The diagnosis was based largely on factor of disorientation and lack of memory, but appellant during the examinations was able to relate quite accurately much of his background and history (*e.g.*, 1 R. 117-19). The notes of the psychiatrists were in a confused state (2 R. 62-65, 1 R. 98), and some of their testimony was confused as well (1 R. 105).

Both inherently, then, and because of the discredit resulting from the presentation, the testimony of the psychiatrists could very rationally and reasonably have been given no weight whatever by the jury.

2. The testimony of appellant's sister (as partially corroborated in No. 12,795) by her brother and a roomer. This testimony did appear to lend support to the insanity theory. However, it is remarkable that the expert witnesses and the lay witnesses emphasized altogether different symptoms, almost as if they were speaking of a different person. The psychiatrists referred almost exclusively to hallucinations and delusions; the lay witnesses, on the other hand, made no mention of these: they testified as to headaches and suicide attempts. This possibly constituted an inherent inconsistency which the jury might well have taken into account. Further, Mrs. Price's testimony in particular was laboring under a much more serious handicap: she was an

obviously interested person and as such her testimony may have justifiably been given little credit.⁴

Her testimony, too, was seriously impaired on cross examination. Many members of her family were living with her at the time of the alleged suicide attempts but she made no effort to awaken any of them to enlist their aid (1 R. 48-49, 55, 57, 2R. 96). Nor did she tell the family physician (1 R. 53-4), appellant's employer (1 R. 50-51), or appellant's new landlady (2 R. 95) of appellant's propensity to suicide. Appellant was not actually in the tub at the time he allegedly attempted to commit suicide in it (1 R. 47). She did not know whether appellant had been trying to commit suicide when he turned on the gas—he might have been doing it to scare her (2 R. 89). She did not observe the attempt to commit suicide by hanging but learned about it from her brother, Everett (1 R. 60). It is interesting to note in that connection that Everett testified that he learned about the attempted hanging from his sister (1 R. 134). Again, very reasonably, no weight may have been given by the jury to the testimony of appellant's sister. Giving the Government the benefit of the favorable inferences, to which it is entitled, it could well be said that there was no credible evidence supporting the insanity theory.

3. The testimony of the victims of the robbery and that of the arresting officers. Officer Foright testified at the first trial that appellant originally was belligerent but later appeared to cooperate. At the second trial he stated that appellant did not act in an unusual, insane, or unnatural manner, and did nothing which would give the officer the impression that he was of unsound mind (2 App. 13-14). Officer Apperti testified at the first trial that appellant related the story of the holdup and the gun and explained that he did not want to involve his sister (1 App. 31), at the second trial that appellant talked just as normally as any other person would, that appellant was fully aware of what he was doing, and that he indicated in no way that he was suffering

⁴ To an equal or perhaps somewhat lesser degree this is true also of the brother and the roomer.

from any delusion (2 App. 16-17). Leo McGrevy, victim of the second robbery (who had had two years of psychology in college) testified that appellant was not acting in any abnormal manner and that there were no indications of insanity (2 App. 9). It was his view that in the case of a robbery he could tell whether a man was sane or not (2 App. 11). He had carefully observed appellant for about ten minutes (2 App. 9). Appellant in his brief seeks to refute the lay testimony offered by the Government to show sanity with quotations from various medical textbooks. The most these treatises show is that some psychiatrists feel that paranoia *may* exist without the individual's appearing obviously deranged on casual contact. However, even leaving aside the fact that the textbooks in question deal with subjects of which neither the court below nor this Court could simply take judicial notice, it is apparent that the testimony of the lay Government witnesses was at least relevant, and that it was for the jury to decide whether to give it great or little weight. Appellant's theory to the contrary would result in establishing an irrebuttable presumption of insanity upon the testimony of defense psychiatrists as to their conclusions, regardless of lay testimony⁵ strongly supporting sanity. That is not the law. As this Court said in *Bell v. United States*, 93 U.S. App. D.C. 173, 174, 210 F. 2d 711 (1953),

Appellant urges on this appeal, first, that he was entitled to an acquittal directed by the court because the uncontradicted evidence was that he was of unsound mind at the time of the commission of the homicide. While it may fairly be concluded that the only two psychiatrists who testified gave support to this defense in their responses to hypothetical questions, there was ample other evidence indicating soundness of mind. The conflict was submitted to the jury under instruc-

⁵ Dr. Gilbert felt that even the verdict of a lay jury had great relevance in supporting a medical-legal opinion on sanity (and presumably insanity) (1 R. 124). *Durham v. United States*, *supra*, is to similar effect. 94 U.S. App. D.C. at 234.

tions which in this regard are not questioned, and which included one that the burden was on the Government to prove beyond a reasonable doubt that the appellant was of sound mind at the time of the killing. *Tatum v. United States*, 88 U.S. App. D.C. 386, 190 F. 2d 612, upon which appellant relies, was thus followed.

4. The behavior of appellant in carrying out the robberies. The robberies took place at night. They appeared well planned and premeditated. The actions of appellant in carrying out the criminal acts themselves were those of a shrewd criminal rather than of a deranged individual. In the first robbery he covered himself with a bellboy. "Let me have the money or I'll kill this guy" (1 App. 2). He told his victims not to say anything until he had gone away (1 App. 6). When arrested, he claimed the money was his own (1 App. 10). Likewise, at the second robbery, appellant stated that he would kill his victim unless he handed over all his money (2 App. 6). He ordered Mr. McGrevy into an adjoining room, sought to lock that room; warned him that if he called the police he (appellant) would come back and kill him (2 App. 7).

The crime showed cool planning and execution, not derangement and insanity. Appellant presumably again would have a rule whereby the jury were instructed to disregard appellant's rational actions as irrelevant because some medical authorities claim that a person can be a schizophrenic without always appearing obviously deranged. To state the proposition is to demonstrate its unsoundness. What we argued under 3, *supra*, applies here as well: these factors were relevant, properly submitted to the jury, and logically citeable in support of the jury's verdict.

5. The presumption of sanity. *Durham v. United States*, *supra*, 94 U. S. App. D. C. at 235.

Taking into account these five factors, a judgment of acquittal was not in order even if the test of *Curley v. United States*, 81 U. S. App. D. C. 389, 160 F. 2d 229 (1947) were to be applied to the issue of whether appellant was or was not suffering from a mental disease or defect.

(b) *The existence of a causal connection*

Assuming, *arguendo*, that the Government failed in its burden of proving that appellant was not suffering from a mental disease or defect, there still remains the issue of the causal connection between such disease or defect and the criminal act. *Durham v. United States, supra*. What was the evidence on that point?

1. The *only* defense testimony as to causal connection at the first trial was this colloquy which occurred during the cross examination of Dr. Gilbert.

Q. Dr. Gilbert, to come back a moment, please, is it your opinion or would it be your opinion that the disease or disorder which you found to be apparent in December was a causative instrument in the commission of the crime of which the defendant is here charged?

A. By reason of the serious nature of the disease it would be my opinion that it was.

Q. That it did cause the crime?

A. It contributed largely to it, I would say, by reason of the serious nature of the disease (1 App. 28).

At the second trial, Dr. Gilbert was somewhat more positive, for he "would say there was a causal connection" and he "would think there was a very definite causal relation" (2 App. 22).

Of course, the witness' testimony in that respect is subject to the same infirmities, both inherent and created by its general confusion, and, particularly with regard to the issue of causation, its lack of basis, explanation, and support, as is his testimony on disease or defect.

2. The testimony of appellant's sister, that of his brother, and that of the roomer, shed no light upon the causation question and may be disregarded on that point.

3. The testimony of the robbery victims and the arresting officers that appellant appeared normal in all respects both during the robberies and at the time of and immediately following his arrest is even more illuminating on the causa-

tion factor than it is on the existence or non-existence of mental disease or defect. If appellant's delusions and hallucinations really had caused him to go out and rob money from two hotels, i. e., if in effect he had been acting out his delusions in the robberies, surely that fact would have been apparent to at least one of the persons with whom he came into contact that night.⁶ At the very least, the jury was entitled to draw such a conclusion and to base its verdict thereon.

4. The same is true with respect to appellant's rationally criminal behavior during and in connection with the robberies. To believe that appellant's mental disease or defect had caused him to commit the robberies in question, the jury had to believe that a person under delusion would, while under the compulsion of that delusion or hallucination, efficiently plan two night-time robberies, carry them out in a most orderly and rational fashion, make his get-away in the approved criminal manner, and betray in no way his true mental state. Perhaps it is possible for a deranged person so to act, but can it really be seriously maintained that the jury was not entitled to reach a contrary conclusion?

5. The presumption of sanity. *Durham v. United States*, *supra*.

It is submitted that there is no question but that the issue of causation was, under the evidence adduced in this case, a jury issue, and that the trial court would have committed serious error had it attempted to take that issue from the jury by directing a judgment of acquittal.

II

The Instructions on Insanity Were Not Erroneous

Appellant complains that the court's instructions were in some way erroneous because, being too "abstract", they had the effect of imposing upon appellant the burden of proving that he was insane when the robberies were com-

⁶ Even Dr. Perretti conceded that it appeared from the statement signed by appellant shortly after the arrest that appellant was not disoriented at that time (1 App. 22).

mitted (Brief, pages 20-21). In the view of the Government the trial court's charge cannot with justice be criticized as being inexplicit with regard to the burden of proof. This is what was said by Judge Letts in No. 12,795 on that subject:

As to the defense of insanity, and without relation to any other issue in the case, you are told that when lack of mental capacity is raised as a defense to a charge of crime the law accepts the general experience of mankind and presumes that all persons, including persons accused of crime, are sane. *But as soon as some evidence of mental disease or mental defect is introduced then the sanity of the defendant, like all other facts, must be proved as a part of the prosecution's case to the satisfaction of the jury beyond a reasonable doubt since the burden of proof is on the prosecution from the beginning to the end of the case, and this burden applies to every element necessary to constitute the crime charged.*

If you, the jury, believe *beyond a reasonable doubt* that the defendant was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged you may find him guilty.

If you believe he was suffering from a diseased or defective mental condition when he committed the act but believe *beyond a reasonable doubt* that the act was not the product of such mental abnormality you may find him guilty. *Unless you believe beyond a reasonable doubt* either that he was not suffering from a diseased or defective mental condition or that the act was not the product of such abnormality *you must find the accused not guilty* by reason of insanity.

.

As to the charge submitted for your verdict, you are instructed that if the Government has proved *beyond a reasonable doubt* each element, essential element of the crime charged, including defendant's sanity at the time

of the commission of the offense charged in the indictment, your verdict should be guilty as charged.

If you find that the Government has proved *beyond a reasonable doubt* all elements necessary to constitute the crime charged except the sanity of the defendant at the time the crime was alleged to have been committed and find that the Government has failed to so prove that the defendant was sane when it is alleged he committed the unlawful act, then *your verdict must be not guilty* by reason of insanity. (1 R. 175-8) (Emphasis added).

Elsewhere, the court commented on the burden upon the Government to prove appellant's guilt beyond a reasonable doubt and on what was meant by a "reasonable doubt" (1 R. 172-3).

Likewise, the court in No. 12,879 (Judge Youngdahl) was careful to spell out the heavy burden imposed upon the Government.

Now, members of the jury, when lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of mankind and presumes that all people, including those accused of crime, are sane. As soon as some evidence of mental disorder is introduced it is *incumbent upon the government that sanity, like any other fact, must be proved beyond a reasonable doubt* as part of the prosecution's case. * * *

If you, the jury, believe *beyond a reasonable doubt* that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged you may find him guilty.

If you believe he was suffering from a disease or defective mental condition when he committed the act, but *believe beyond a reasonable doubt* that the act was not the product of such mental abnormality, you may find him guilty.

Unless you believe beyond a reasonable doubt either that he was not suffering from a disease or defective mental condition, or that the act was not the product of

such abnormality, *you must find the accused not guilty* by reason of insanity. (2 R. 126-7).

And the court commented on the burden of the Government to prove appellant's guilt beyond a reasonable doubt and on what was meant by "reasonable doubt" (2 R. 123-5), and it further commented upon the testimony of the defense psychiatrist (2 R. 127-8).

Both judges adhered closely to the instruction suggested by this Court in the *Durham* case. Appellant sees in that a vice rather than a virtue; and he indicates that the *Durham* Court did not purport to lay down an exact instruction binding in all cases. However, there is no special circumstance in the instant case which would render the *Durham* instruction inappropriate. Appellant's sole wish here "that the jury should have been told in plain English that it was the government's job to prove appellant's sanity, and not appellant's job to prove his own insanity" was granted when Judge Youngdahl said that it was "incumbent upon the government, that sanity, like any other fact, must be proved beyond a reasonable doubt as part of the prosecution's case" and when Judge Letts instructed that "the sanity of the defendant, like all other facts, must be proved as a part of the prosecution's case to the satisfaction of the jury beyond a reasonable doubt."

Plainly, the courts' instructions were not erroneous.

III

The Arguments of the Prosecutor Were Not Prejudicial

Appellant complains of prejudicial argument by counsel. There is little merit to that contention.

It is quite evident that none of the remarks of Government counsel exceeded the limits of legitimate argument; certainly there was no prejudice. When he commented that appellant wanted to be "acquitted and go free" that of course was directed to the distinction between being found guilty or not. The reference to going free in the context merely meant that appellant would not have to go to prison if acquitted. In any event, the very first thing defense counsel said in his closing argument was this:

I would like, ladies and gentlemen of the jury, to correct one thing that Mr. Titus may have implanted in your minds. When he finished he said, "Do you want to see this man acquitted and go free?"

Now, it is up to the Court what will happen to this man if he is acquitted by reason of insanity. So let me straighten out your minds on that. It doesn't mean that he goes free. That is up to the Court entirely.
 * * * (1 App. 41).⁷

Any confusion that may have existed in the jury's mind was eliminated when the Court instructed that upon a verdict of not guilty by reason of insanity the court may certify the facts to the proper Federal authority, and the defendant "would be confined" in an institution for the care and treatment of insane persons until such time as he was restored to sanity (1 App. 50).⁸

Likewise, in No. 12,879 the first and last point made by defense counsel was that appellant, if found not guilty by reason of insanity, would not go free (2 App. 29, 32); and the court instructed the jury in the language of *Taylor* that

When an accused person is found not guilty by reason of insanity, he will be presumed to be insane and may be confined in the hospital for the insane as long as the public safety and his welfare require (2 App. 38).

The brief reference to a paranoid being violent found support (1) in the efforts of the defense to establish appellant as a violent person (1 R. 37), and (2) in the ambiguity of Dr. Perretti's testimony on the point (1 App. 20). It was a fair comment on the evidence.

⁷ Actually, appellant just having been found by the St. Elizabeth's staff to be of sound mind, it could hardly be doubted that as a matter of realistic fact he would speedily have gone completely free in the event of a verdict of not guilty by reason of insanity.

⁸ In Nos. 12,275-8—*Stogner v. United States* — U.S. App. D.C. — (December 1, 1955), where a far less favorable instruction was given, this Court held that "Other errors urged [including a complaint as to the instruction] were not reserved for review by trial counsel and are not of a character, in the context of the record as a whole, to require us to exercise a discretion to notice them."

Finally, the prosecutor was entitled to seek to undermine the credibility of the defense psychiatrists,⁹ particularly where defense counsel in a most unfair manner commented upon the failure of the Government to bring in opposing psychiatrists, (2 R. 100, 103), knowing full well that the prosecutor thought he was precluded from so doing by the *Taylor* decision.¹⁰

In sum, the prosecutor's statements were fairly innocuous and fell well within the rule that he, as well as the defense attorney, may make such reasonable inferences as will support his theory of the case, and that there will not be reversible error unless the language used is plainly unwarranted and clearly injurious. *Mellor v. United States*, 160 F. 2d 757, 765 (8th Cir. 1947), *cert. denied*, 331 U. S. 848 (1947); *DiCarlo v. United States*, 6 F. 2d 364, 368 (2d Cir. 1925); *United States v. Cohen*, 177 F. 2d 523, 527 (2d Cir. 1949); *cert. denied*, 339 U. S. 914 (1950); *Hall v. United States*, 84 U. S. App. D. C. 209, 171 F. 2d 347 (1948); *Ochoa v. United States*, 167 F. 2d 341, 344 (9th Cir. 1948).

IV

The Admission of Dr. Epstein's Testimony Did Not Constitute Prejudicial Error

Appellant's fourth point, that it was error to permit Dr. Epstein to testify on behalf of the prosecution, is of course limited to No. 12,795, since Dr. Epstein did not testify in No. 12,879. Appellant asserts that Dr. Epstein's testimony was within the prohibition of *Taylor v. United States*, — U. S. App. D. C. —, 222 F. 2d 398 (1955), and that conse-

⁹ Cf. *United States v. Klein*, 187 F. 2d 873 (7th Cir. 1951), *cert. denied*, 341 U.S. 952 (1951).

¹⁰ We do not suggest that the Government may counter prejudice with prejudice (although we invite the Court to read in full the closing arguments made by both sides and judge the unfairness of that made by the defense) but to show that the inflammatory remarks of defense counsel were bound to excite some heat of advocacy. Cf. *Malone v. United States*, 94 F. 2d 281, 288 (7th Cir. 1938), *cert. denied*, 304 U.S. 562 (1938); *Myres v. United States*, 174 F. 2d 329, 339 (8th Cir. 1949), *cert. denied*, 338 U.S. 849 (1949).

quently the conviction ought to be reversed. But not only is Dr. Epstein's testimony not necessarily within the ambit of *Taylor*, not only has the statutory basis for the *Taylor* decision since been repealed by Congress, but also, if all this were not true and if the admission of the testimony (which was not objected to) were to be considered error, such error would, for several reasons, be non-prejudicial and not ground for reversal.

In the *Taylor* case, Dr. Epstein testified that appellant had told him that he was not suffering from hallucinations or delusions at all but that in effect he had been "faking" these symptoms. In other words, the psychiatrist revealed at the trial specific statements made to him presumably in confidence by a patient under treatment. In the instant case, on the other hand, Dr. Epstein merely offered some generalized testimony primarily on matters that were or could be of official record, such as the time appellant was in the hospital, and the official diagnosis. With regard to the presence of the illness, its severity and its characteristics, Dr. Epstein stated that he could give *no* definite data or information (1 App. 33-4).

Also, in the instant case, unlike *Taylor*, there was no protest by Dr. Epstein and there was no objection to his testimony or any claim of privilege. Thus, while some of the broad language in the *Taylor* opinion may be made pertinent here, nevertheless this case on its facts is so far removed from *Taylor* as to be in no way comparable thereto or controllable thereby. Consequently it would appear that *Taylor* is not necessarily applicable even in No. 12,795.

Moreover, the *Taylor* decision was based on a statute which has since been repealed and for which an enactment was substituted under which Dr. Epstein's testimony clearly would be admissible. Section 4 of Public Law 313, referred to above, provides that the physician-patient privileges shall not be applicable

to evidence relating to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity, or in the pretrial or posttrial proceedings involving any criminal case where a ques-

tion arises concerning the mental condition of an accused or convicted person.

Clearly, if appellant's trial had taken place after the date of enactment of the instant statute, Dr. Epstein's testimony would not have been inadmissible. Does the fact that the trial predates such date of enactment render the statute any less applicable? We suggest that it does not. The general rule of statutory construction of course is that statutes are prospective only, but it is well recognized that rules of evidence are at all times subject to modification by the legislature, and that a statute relating to such rules constitutes an exception to the general rule against retroactive construction. 82 C.J.S., Statutes, § 424. See also, *Beatty v. United States*, 191 F. 2d 317 (8th Cir. 1951); *United States v. Fullerton*, 87 F. Supp. 359 (D.Mass. 1949); *Hadlich v. American Mail Line*, 82 F. Supp. 652 (N.D. Cal. 1949). Since in view of the yet-to-be-completed appellate proceedings the instant case is not finally terminated, it would seem that this Court, under the rule sketched out above, should view the admissibility of Dr. Epstein's testimony in the light of present law rather than in the light of the statute construed by *Taylor*.

This is true all the more since a different application of the rule would yield thoroughly unrealistic results. Assuming, *arguendo*, that the Court would affirm the conviction but for the assumed error in the admission of Dr. Epstein's testimony, if it were then to reverse and remand for a new trial, Dr. Epstein's testimony would be admissible at that trial under the new statute. Under the circumstances, reversal and remand would be a useless act.¹¹ It is sub-

¹¹ There is no *ex post facto* problem, because statutes which enlarge the class of persons who may be competent to testify are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to acts previously done which were innocent when done; nor aggravate any crime theretofore committed; nor provide greater punishment; nor alter the degree or lessen the amount or measure of proof which was made necessary to conviction when the crime was committed. *Hopt v. Utah*, 11 U. S. 574, 589 (1884). Cf. *Mallery v. Frye*, 21 App. D.C. 105, 116 (1903); *Gibsen v. Mississippi*, 162 U.S. 565, 590

mitted, therefore, that the Court either should give outright retroactive application to Public Law 313 rendering the admission of Dr. Epstein's testimony non-erroneous; or at least consider Public Law 313 on the question of prejudice, with the result that in view of the certain application of Public Law 313 at a retrial, any error that may have occurred by the admission of the testimony would be a harmless error. Under either theory, no reversal would be called for.

Finally, assuming *arguendo*, that error persists and that such error is not harmless under the above rationale, still a reversal would not be indicated because of the inherently innocuous nature of the admitted testimony and the resulting non-prejudiciality of the assumed error.

Dr. Epstein's testimony was in no way prejudicial to appellant. He testified preliminarily that appellant was admitted to the Maximum Security Division of St. Elizabeth's Hospital early in 1953; that he remained at the hospital until July of 1954; that the official diagnosis was schizophrenic reaction, paranoid type, and that there occurred a gradual alleviation of his symptoms (1 App. 32). Dr. Epstein was then asked as to whether he was able to form any opinion on whether appellant was suffering from a mental disease or disorder which would have caused him to commit the crime on the date of the crime. To that query, the only one of consequence, the psychiatrist replied that he "could say rather definitely that [appellant] was likely a disturbed person in the sense that we do have information from his mother that there was an attempt by Mr. Douglas to take his life;" but beyond that he would be unable to say for what length of time prior to the examinations performed at the hospital appellant's illness existed (1 App. 33-4). In other words, Dr. Epstein did not say either that appellant was or that he was not suffering from a mental disease or disorder at the time of the commission of the

(1896); *Thompson v. Missouri*, 171 U. S. 380, 386-7 (1898); *Mallott v. North Carolina*, 181 U. S. 589 (1901); *Beazell v. Ohio*, 269 U.S. 167 (1925); *Landay v. United States*, 108 F. 2d 698, 705 (6th Cir. 1939).

crime: he simply could not tell. If anything, the emphasis of the testimony was on the possibility that the illness might have existed on the date of the crime, for on cross examination Dr. Epstein stated in reply to a question as to whether it was true that schizophrenia of the paranoid type usually developed over a long period of time, that the "groundwork for it is of rather a long period, and again much of the theory with respect to schizophrenia is in a state of flux" (1 App. 34).

This testimony even if not admissible, certainly was not so prejudicial to appellant as to be cause for reversal of the conviction; for its generally neutral character hardly can be deemed to have been a decisive factor in the jury's verdict.

V

Any Variance Between Indictment and Proof Was Immaterial

Appellant's fifth point is that the conviction in No. 12,879 is vitiated by a variance between the indictment and the proof in that whereas the indictment alleged that appellant took from the person and from the immediate actual possession of one Lee McGrevy money belonging to one Khoren H. Aslanian, the proof showed that the money taken from McGrevy was owned partly by McGrevy himself and partly by the Court Hotel (without any connection being shown between the Hotel and Aslanian).

But the well-established rule is that since the robbery statute is silent as to ownership of the property taken; since the law regards the crime of robbery as a crime against the person in that its essence is the exertion of force against another; and since in the eyes of the law as against the robber the person robbed is considered the owner of the property whereof he is robbed; a variance between indictment and proof as to ownership of property is not material so long as the offense is otherwise described with sufficient certainty to identify the act of robbery and to establish that the property was in the immediate actual possession of the person robbed. *United States v. Mann*, 119 F. Supp. 406 (D.C. 1954); *Commonwealth v. Weiner*, 255 Mass. 506, 152

N.E. 359 (1926); *Lamb v. Commonwealth*, 266 Ky. 561, 99 S.W. 2d 441 (1937); *People v. Renalle*, 410 Ill. 372, 102 N.E. 2d 116 (1951); *State v. Fitzsimmons*, 338 Me. 230, 89 S.W. 2d 671 (1936); *People v. Leach*, 398 Ill. 515, 76 N.E. 2d 425 (1948); *People v. Smith*, 78 Cal. App. 68, 248 Pac. 261 (1926); *Nix v. State*, — Ala. —, 36 So. 2d 452 (1948); *Jones v. State*, 42 Ga. App. 290, 155 S.E. 797 (1930).

The *Cartwright* case¹² is not to the contrary, for it involved a prosecution not for robbery but for larceny, a crime the gist of which is a violation of possession, under a statute which made the ownership of the property a very material element of the offense; consequently, it is not authority upon which to test fatality of a variance in a robbery case. Cf. *United States v. Mann*, *supra*; *Neufield v. United States*, 73 App. D.C. 174, 187, 118 F. 2d 375, 387-388 (1941), *cert. denied*, 315 U.S. 798 (1942); *People v. Ficaretta*, 385 Ill. 108, 52 N.E. 2d 165 (1944).

VI

Appellant Was Not Denied Due Process of Law by Incompetence of Trial Counsel

Appellant complains also about the failure of his trial counsel in No. 12,879 to call three witnesses who were called and who testified at the trial in No. 12,795, and he seems to argue that this failure to call witnesses amounted to ineffective assistance of counsel per se so as to deprive him of due process of law.

Trial counsel in both cases was Harry Ahern, Esq. Mr. Ahern did call the three witnesses in question at the first trial but in view of the result of that case it was at least a fair inference that the tactics then employed, including the calling of the three witnesses, were not particularly effective. At the second trial counsel was faced with the problem of presenting an identical defense (insanity) and it may well be that he felt that a change in tactics to the extent possible might avoid a repetition of the previous

¹² *Cartwright v. United States*, 146 F. 2d 133 (5th Cir. 1944). Cited at page 28 of appellant's brief.

outcome. It may be, too, that counsel believed that too much repetition of the essential testimony upon which appellant had to rely—and repetition, as will appear hereinafter, is essentially what the omitted testimony amounted to—would have the effect of prejudicing the jury against his client rather than of producing a favorable effect. This, then, was a choice of trial tactics, and what this Court stated in *Felton v. United States*, 83 U.S. App. D.C. 277, 278, 170 F. 2d 153, 154 (1948), *cert. denied*, 335 U. S. 831 (1948), is quite to the point:

The record abundantly shows that appellant was represented at his trial by experienced counsel of his own selection. No allegation has been made of flagrant disregard of appellant's rights. As a matter of fact, if all of the alleged "mistakes" of the defense counsel were admitted as such by the Government they would either be entirely harmless or amount to nothing more than the selection of trial tactics familiar to every trial lawyer and entirely within his purview in the trial of a case. No trial lawyer worthy of the name would be willing to appear in court with someone at his elbow at every decision he made incident to the trial of a case. The suggestion made by appellant that it is a duty of this court to undertake to substitute its judgment of the proper tactic in the trial of a case for that of the lawyer in the forum is baseless and unacceptable.

Likewise, in *Burton v. United States*, 80 U.S. App. D.C. 208, 209, 151 F. 2d 17, 18 (1945), *cert. denied*, 326 U. S. 789 (1946), contentions similar to those in the instant case were raised, but this Court held:

The second ground of appeal is the alleged incompetency of appellant's trial counsel. This is based on failure to object to certain evidence and failure to rebut certain evidence. The record affirmatively shows that the case was competently tried. These failures to object which are called to our attention can be defended on the ground that they were good trial

strategy. But if this assumption were incorrect they would not be ground for reversal. There are few trials free from mistakes by counsel. After judgment and on appeal, errors in judgment as to the conduct of the defense are easy to point out. Here the appellant selected his counsel and made no objection to his conduct of the case during trial. Under such circumstances it is well settled that error in judgment, incompetency or mismanagement of the defense by counsel is generally not ground for a new trial. This is not to deny that a defendant's rights may be so "flagrantly disregarded by counsel of his own choosing, and, as a consequence, justice so manifestly miscarry," that a new trial should be ordered. The record does not show that counsel could have rebutted the prosecution's evidence or that the introduction of any of the evidence was prejudicial.¹³

See also, *Diggs v. Welch*, 80 U.S. App. D.C. 5, 148 F. 2d 667 (1945), *cert. denied*, 325 U.S. 889 (1945); *United States ex rel Feeley v. Ragen*, 166 F. 2d 976 (7th Cir. 1948); *Moss v. Hunter*, 167 F. 2d 683 (10th Cir. 1948), *cert. denied*, 334 U.S. 860 (1948); *Merritt v. Hunter*, 170 F. 2d 739 (10th Cir. 1948).

In the instant case (No. 12,879) the record demonstrates as well as it ever might show in any case that the omissions of counsel complained of had no prejudicial effect: for in No. 12,795, where those omissions did not occur and where the defense theory was identical, no greater success was achieved.

Also, the testimony of the three witnesses had they been called at the second trial would have been cumulative at best, contradictory at worst. Dr. Perretti testified at the first trial that he examined appellant on two occasions and that as a result of those examinations he concluded that appellant was suffering from schizophrenia of the paranoid type and he further testified that while it could not definitely

¹³ Footnotes omitted.

be established how long a period of time it would take to reach appellant's stage of the illness he would say that it went as far back as the date of the crime (1 App. 18-19). Dr. Gilbert, Chief Psychiatrist for the District of Columbia, stated that he examined appellant on two occasions and concluded that appellant was suffering from dementia praecox or schizophrenia, not of the paranoid type, but of a mixed type with catatonic features (1 R. 108-9). He further stated that it was his opinion that appellant had been suffering from a mental disorder or mental disease for at least several years (long before the date of the crime) (1 App. 27). His testimony at the second trial was to the same effect (2 App. 21-2). Thus, Dr. Gilbert's testimony was not only more authoritative than Dr. Perretti's but also more definite with regard to the crucial factor of the duration of the illness. Under the circumstances, and in view of some contradiction, counsel may well have reasonably and properly decided to dispense with Dr. Perretti's testimony at the second trial.

The second witness who was called at the first trial but not at the second, was Fredolph Anderson. The insignificance of his contribution can partly be judged by the fact that his direct examination at the first trial consisted of no more than eleven questions, occupying but 1½ pages of the transcript. As a matter of fact, all the witness testified to was that as a roomer in appellant's sister's apartment he understood that appellant suffered from severe headaches (1 App. 28). The value of that statement was undermined to some extent not only by his admission on cross-examination that he lived in the apartment for two years but did not notice the headaches until the end of his stay but also by his further testimony that he knew of no doctor's visits as a result of the headaches (1 R. 127).

Everett Franklin Douglas' direct testimony at the first trial likewise occupied no more than two pages of the transcript. All he could testify to was that he observed appellant (his brother) suffer from severe headaches, and that on a visit to his sister's home he observed a rope scar on appellant's neck (1 R. 129, 133). On cross examination he

conceded that he learned about the headaches from his sister (1 R. 132) and further he contradicted his sister by testifying that he also learned about the attempted suicide from her (1 R. 133). Moreover, he was ready to go overseas the day of the second trial or the next day (2 R. 96).

Not only, then, was the testimony of the two witnesses of little significance in itself and impeached to some extent by cross examination and contradiction, but it was wholly cumulative to the principal testimony with respect to the headaches and possible suicide attempts as given by May Price, appellant's sister. Mrs. Price in considerably more detail and exactitude than was possible for either of the two other witnesses described her observations of appellant's behavior (First trial, 1 R. 32-74; second trial, 2 R. 44-51, 79-86), and what Messrs. Anderson and Douglas could have added was of such little import as appears on the record of No. 12,795 that trial counsel may well have felt that, as with Dr. Perretti's testimony, he could dispense with their appearance.

In any event, it can hardly be said that failure to call the three witnesses in question was such a gross and shocking error as to amount to a deprivation of due process of law and to call for reversal of the conviction, particularly as no complaint is made with respect to the otherwise able and competent handling of the trials by counsel.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgments of conviction be affirmed.

LEO A. ROVER,
United States Attorney.

LEWIS CARROLL,
HAROLD H. TITUS, JR.,
HAROLD H. GREENE,
Assistant United States Attorneys.

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United States Court of Appeals
For the
District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12795 AND 12879

15 1956
Joseph W. Stewart
CLERK

CHARLES W. DOUGLAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING EN BANC

Comes now the United States by its attorney, the United States Attorney, and moves the Court to permit a rehearing before the Court *en banc*, for the reasons hereinafter set forth.

In *Western Pacific R. Co. v. Western Pacific R. Co.*, 345 U. S. 247, and in *Stephens, Address*, 20 D. C. B. A. J. 103, the Supreme Court and the former Chief Judge of this Court delineated the types of cases appropriate for the exercise of the Court's *en banc* power under 28 U. S. C. § 46 (c). Principal among the categories there listed are (1) cases involving a question of extraordinary public importance, and (2) cases involving a question whether a decision of the Court should be overruled. It is respectfully submitted that the decision in the above entitled case falls within both of the categories listed, and that consequently a rehearing *en banc* should be ordered.

I

Inconsistency with prior law

1. In the instant case the Court reversed judgments of conviction in two criminal cases and remanded for new trials principally on the ground that the two juries had acted arbitrarily in failing to acquit the defendant by reason of insanity. The Court held that the accused was entitled to such a verdict as a matter of law; and it further held that in resolving the sanity issue the juries here could not be limited to the so-called

impulse" instruction. But *Durham* relegated the question as to whether the accused knew right from wrong or was acting as he did because of irresistible impulse to the status of mere "symptoms, phases or manifestations" and thus relevant only in an evidentiary sense. It wholly rejected the view that these older doctrines are still proper tests of criminal responsibility. In the opinion these tests of criminal responsibility were characterized in such terms as "fallacious," "little relation to the truths of mental life," "based on an entirely obsolete and misleading conception of the nature of insanity," resting upon "inadequate, invalid or indeterminable symptom or manifestation," "inadequate" because "based upon one symptom."

To revive tests which this Court has so unequivocally condemned would seem to imply a repudiation of *Durham* and the decisions which followed it. To transform "right and wrong" and "irresistible impulse" from mere fragments of evidence from which the jury is to make the ultimate determination of criminal responsibility into one more definition of criminal responsibility would be to multiply opportunity for confusion of the jury and to make it difficult in the extreme for the trial judge to select the test or tests appropriate for each particular occasion. To require everlengthening instructions on the sanity question would be to unduly emphasize it at the expense of others of equal and perhaps greater import to the community and perhaps even the defendant.

Durham was intended to be a step forward, in that one broad and clearly defined insanity test was thereby substituted for several inadequate and scientifically erroneous tests. A requirement that the old tests be revived to stand side by side with the new doctrine, is not consistent with the purposes of *Durham*, is of significant import, and should be adopted only by the full Court.

5. 24 D. C. Code § 301 provides that upon an acquittal by reason of insanity the accused shall³ be confined in a hospital for the mentally ill. Direction of a verdict of acquittal by reason of insanity therefore violates the right to trial by jury guaranteed to the accused by the Sixth Amendment. For obviously if pursuant to Section 301 the Court directs incarceration

³ Previously: "may" be confined.

tion in a mental hospital, the accused will have been deprived of his right to go wholly free upon a possible jury verdict of not guilty. The opinion herein has sought to solve the dilemma by permitting the accused to go to the jury on both the issue of guilty and that of criminal responsibility, and then, if the jury finds him guilty, allowing the court to direct a verdict of not guilty by reason of insanity notwithstanding the verdict. But that solution does not solve at least four fundamental problems: (1) must not the accused even at that stage still waive his right to a jury trial before he can be incarcerated in a mental hospital? (2) is he to go free if he does not waive such right? (3) can constitutional rights in that regard be deemed waived by implication? (4) is not such a procedure a violation of Rule 23 (a), F. R. Crim. P., and of *Patton v. United States*, 281 U. S. 276, 299, 312, which require the consent of the Government for any waiver of the right to trial by jury? It is submitted that the opinion herein encroaches upon Sixth Amendment rights and that its soundness should be reviewed by the Court sitting *en banc*.

II

Other questions of great public importance

1. The instant decision marks the first time in this jurisdiction—and so far as appears from the lack of citation in either appellant's brief or in the opinion, in any other jurisdiction—that a court has overturned a jury verdict on the issue of sanity for lack of sufficient evidence to support it. Two conclusions are suggested by that fact: (1) that such a radical departure from established tradition ought not to be accomplished except by the full court; and (2) that there may be good reasons for this lack of precedent for the decision. The first of these inferences is self-explanatory; this section of the motion will be devoted to sketching out what the Government believes to be the reasons for the lack of prior authority for the decision.

Insanity is a defense to crime solely because of the fact that society will not assess legal responsibility where there is no moral responsibility. In the ultimate, therefore, the

¹See note 7 of the opinion.

Durham test of responsibility but had to be instructed to consider also the right-wrong and irresistible impulse tests, laid down by the *M'Naghten* case, 8 Eng. Rep. 718, and *Smith v. United States*, 59 App. D. C. 144, respectively. The Government submits that these holdings not only overrule prior decisions of this Court, but that they also introduce elements of such reach into the administration of criminal justice in the District of Columbia that a question of extraordinary public importance calling for the exercise of the *en banc* power is clearly involved.

2. The decision in the instant case overrules the prior decision of this Court in *Holloway v. United States*, 80 U. S. App. D. C. 3.

In that case as in this, there was what appeared to be strong psychiatric opinion evidence that the accused was not sane;¹ and in that case as in this, the argument was made that because of the weight of such evidence the record disclosed such substantial doubt of sanity that the verdict should be set aside. But the Court said in *Holloway* that the judgment of the psychiatrists, while relevant, is not necessarily controlling; and that the judgment of the jury that they have no reasonable doubt of the defendant's sanity "should not be disturbed on the ground it is contrary to psychiatric opinion," whereas the Court held in the instant case that the jury's verdict, since contrary to psychiatric opinion, constituted an arbitrary and illegal disregard of such opinion. There clearly is a deep conflict between the two holdings. For to say, as the Court said in *Holloway*, that a jury verdict is contrary to expert psychiatric opinion, is equivalent to saying that the jury disregarded such opinion. And to say that a jury verdict shall stand and may not be disturbed though it be contrary to expert psychiatric opinion is

¹ But it is perhaps significant that there was little evidence in the instant case on the second aspect of the *Durham* test; i. e., that the mental disease caused the crimes. On that issue the observations of the lay eyewitnesses were at least as valid as the opinions of the psychiatrists. Moreover, it taxes credulity to believe that robberies for gain carried out in a cool, rational manner, in deserted spots at night, were the result of schizophrenia or dementia praecox. It would appear, therefore, that even by the Court's own interpretation of the law, there was little factual basis for the result. Rather, this result appears to be the product of a weighing of conflicting evidence.

equivalent to saying that the jury may disregard such opinion. In short, whichever view is taken of the holdings in the two cases, they are incompatible.

This is not a matter of mere semantics. In *Holloway*, this Court, for fundamental jurisprudential reasons decided that cumulative psychiatric opinion was not a substitute for the moral judgment of the jury; in the instant case, the Court has wholly overturned this concept. In effect, if not in language, the opinion herein overrules *Holloway*.

3. Nor is this the only departure from the law as established in the *Holloway* decision. In the case at bar it was held that when the Court stated in *Holloway* that a jury verdict on the question of sanity could be reversed only if it "shocks the conscience of the court," it had meant but to give graphic expression to the rule generally applicable when a court is asked to set aside a jury verdict for lack of sufficient evidence.² But in *Holloway* the Court specifically and in advance disowned such interpretation. For it there held that "Had there been an equivalent conflict of testimony about the actual commission of the offense it might well be that the verdict could not stand. But the issue of criminal responsibility of a defendant suffering from mental disease is not an issue of fact in the same sense as the commission of the offense." As to that issue, said the Court, following an exhaustive discussion of the reasons for the difference, the jury verdict can be overturned—if at all—only if such verdict shocks the conscience of the Court. To equate the test of review on the sanity issue with that employed with respect to purely factual issues consequently contravenes the *Holloway* language. It is submitted that the Court should decide *en banc* which of the two tests is to be applied by the District Court and by this Court in future criminal cases in which sanity is in question.

4. The Court holds that the *Durham* instruction on the test of criminal responsibility is in the future to be supplemented in appropriate cases by a "right-wrong" and an "irresistible

²The references to *Curley v. United States*, 81 U. S. App. D. C. 389, and *Cooper v. United States*, 94 U. S. App. D. C. 343, further strengthen the impression that in the view of the Court now the test of review of a judgment on the sanity issue is no different than that pertaining to any other.

impulse" instruction. But *Durham* relegated the question as to whether the accused knew right from wrong or was acting as he did because of irresistible impulse to the status of mere "symptoms, phases or manifestations" and thus relevant only in an evidentiary sense. It wholly rejected the view that these older doctrines are still proper tests of criminal responsibility. In the opinion these tests of criminal responsibility were characterized in such terms as "fallacious," "little relation to the truths of mental life," "based on an entirely obsolete and misleading conception of the nature of insanity," resting upon "inadequate, invalid or indeterminable symptom or manifestation," "inadequate" because "based upon one symptom."

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Durham was intended to be a step forward, in that one broad and clearly defined insanity test was thereby substituted for several inadequate and scientifically erroneous tests. A requirement that the old tests be revived to stand side by side with the new doctrine, is not consistent with the purposes of *Durham*, is of significant import, and should be adopted only by the full Court.

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Insanity is a defense to crime solely because of the fact that society will not assess legal responsibility where there is no moral responsibility. In the ultimate, therefore, the

¹ See note 7 of the opinion.

question of criminal responsibility is neither a legal question nor a factual question in the strictest sense; it is a moral question. *Holloway v. United States*, *supra*; REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 100; *Durham v. United States*, 94 U. S. App. D. C. 228, 242. For that reason, criminal responsibility cannot be measured by the result of scientific analysis or objective judgment; it cannot be measured by the scientific opinion of psychiatrists or by the legal opinion of jurists; the "instinctive sense of justice of ordinary men" is the tribunal which determines whether a man is morally, hence, legally responsible for his criminal acts. And the "institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men." 80 U. S. App. D. C. at 5.

If these be the fundamental philosophical premises which underlie absolution from punishment of a criminal for lack of responsibility, then reversal of a jury decision on this issue by a court could be justified on but one assumption: that courts are necessarily better qualified to render a moral (as distinguished from strictly legal) judgment than jurors. Obviously, under our system of government, such an assumption would be unthinkable, and it is because of this dilemma that courts everywhere have refused to overturn jury verdicts on the sanity question. And the additional reason assigned by the courts (notably by this Court in *Holloway*) for leaving jury verdicts on the issue undisturbed has been the proposition that judgments with respect to criminal insanity "must be based on the instinctive sense of justice of ordinary men," and that "To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do."⁵ It is respectfully submitted that the decision herein, because in conflict with the fundamental principles outlined above, is in error, and that a rehearing *en banc* is indicated.

2. This Court has broad powers in regard to the formulation of tests of criminal responsibility and related subjects.

⁵ Compare note 1, *supra*. The present departure from *Holloway* appears to lend justification to Professor Hall's fear of the "Tyranny of Experts," envisaged in his recent article in the American Bar Association Journal, 42 A. B. A. J. 917 (Oct. 1956).

Durham v. United States, supra. In exercising these powers the Court may properly be governed in part by policy considerations which are foreign to it in other fields of law. It is submitted that this Court should rehear the instant case *en banc* in order to take into account questions having to do with the administration of the criminal law in the District of Columbia which are of serious concern not only to the prosecution but also to the community at large.

The instant decision, as the Government sees it, superimposes these innovations upon the criminal law of the District of Columbia: (a) the jury is no longer restricted to one set of insanity tests but may find the accused not guilty by reason of insanity under any one of three theories or by a combination thereof: that the criminal act was caused by mental disease or defect, that it was the product of irresistible impulse, or that it occurred because the individual did not know the difference between right and wrong; (b) even if the jury finds the accused guilty, the trial court and the appellate courts will scrutinize the record with a view to determining whether in their opinion the jury verdict was arbitrary when viewed in the light of the opinion of psychiatrists; (c) the accused will be entitled to go to the jury on both the issue of innocence and that of lack of guilty by reason of insanity, and if both are decided against him he may then have the issue of sanity once again redetermined by the court; (d) opinion testimony of psychiatrists is conclusive upon the jury, even if contradicted in part by lay testimony, in direct contravention of the universal rule that opinion testimony does not stand on the same footing as testimony as to facts; * (e) in any case in which the accused proffers psychiatric testimony, the Government will be forced to produce experts of its own in the expectation that defense experts will persuade reviewing courts, no matter how discreditable their personal testimony may appear to the jury.

The Government would be remiss in its duty both to the Court and to the community if it did not express its concern with the cumulative effect of these holdings upon the cause of law enforcement in the District of Columbia.

* See *State v. Moore*, 42 N. M. 135, 76 P. 2d 19, 34.

CONCLUSION

Wherefore, it is respectfully submitted that the instant decision is in error, that it overrules prior law, that it adversely affects the public interest in the administration of justice, and that it requires review by the Court sitting *en banc*.

(S) Oliver Gasch,
OLIVER GASCH,
United States Attorney.

(S) Lewis Carroll,
LEWIS CARROLL,
Assistant United States Attorney.

(S) Harold H. Greene,
HAROLD H. GREENE,
Assistant United States Attorney.

CERTIFICATE OF GOOD FAITH

It is hereby certified that the petition is presented in good faith and not for delay.

(S) Harold H. Greene,
HAROLD H. GREENE,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Rehearing En Banc has been mailed to attorney for appellant, Edward Bennett Williams, Esq., 1000 Hill Building, Washington, D. C., this 14th day of November, 1956.

(S) Harold H. Greene,
HAROLD H. GREENE,
Assistant United States Attorney.

OFFICE COPY

U.S. Court of Appeals

Dist. of Columbia Circuit

FILED NOV 15 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph W. Stewart
CLERK

Nos. 12,795 & 12,879

CHARLES W. DOUGLAS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING EN BANC

Comes now the United States by its attorney, the United States Attorney, and moves the Court to permit a rehearing before the Court en banc, for the reasons hereinafter set forth.

In Western Pacific R. Co. v. Western Pacific R. Co., 345 U.S. 247, and in Stephens, Address, 20 D.C.B.A.J. 103, the Supreme Court and the former Chief Judge of this Court delineated the types of cases appropriate for the exercise of the Court's en banc power under 28 U.S.C. § 46(c). Principal among the categories there listed are (1) cases involving a question of extraordinary public importance, and (2) cases involving a question whether a decision of the Court should be overruled. It is respectfully submitted that the decision in the above entitled case falls within both of the categories listed, and that consequently a rehearing en banc should be ordered.

I

Inconsistency With Prior Law

1. In the instant case, the Court reversed judgments of conviction in two criminal cases and remanded for new trials principally on the ground that the two juries had acted arbitrarily in failing to acquit the defendant by reason of insanity. The Court held that the accused was entitled to such a verdict as a matter of law; and it further held that in resolving the sanity issue the juries here could not be limited to the co-called Durham

test of responsibility but had to be instructed to consider also the right-wrong and irresistible impulse tests, laid down by the M'Naghten case, 8 Eng. Rep. 718, and Smith v. United States, 59 App. D.C. 144, respectively. The Government submits that these holdings not only overrule prior decisions of this Court, but that they also introduce elements of such reach into the administration of criminal justice in the District of Columbia that a question of extraordinary public importance calling for the exercise of the en banc power is clearly involved.

2. The decision in the instant case overrules the prior decision of this Court in Holloway v. United States, 80 U.S. App. D.C. 3.

In that case as in this, there was what appeared to be ^{1/} strong psychiatric opinion evidence that the accused was not sane; and in that case as in this, the argument was made that because of the weight of such evidence the record disclosed such substantial doubt of sanity that the verdict should be set aside. But the Court said in Holloway that the judgment of the psychiatrists, while relevant, is not necessarily controlling; and that the judgment of the jury that they have no reasonable doubt of the defendant's sanity "should not be disturbed on the ground it is contrary to psychiatric opinion", whereas the Court held in the instant case

^{1/} But it is perhaps significant that there was little evidence in the instant case on the second aspect of the Durham test; i.e., that the mental disease caused the crimes. On that issue the observations of the lay eyewitnesses were at least as valid as the opinions of the psychiatrist. Moreover, it taxes credulity to believe that robberies for gain carried out in a cool, rational manner, in deserted spots at night, were the result of schizophrenia or dementia praecox. It would appear, therefore, that even by the Court's own interpretation of the law, there was little factual basis for the result. Rather, this result appears to be the product of a weighing of evidence by the Court.

that the jury's verdict, since contrary to psychiatric opinion, constituted an arbitrary and illegal disregard of such opinion. There clearly is a deep conflict between the two holdings. For to say, as the Court said in Holloway, that a jury verdict is contrary to expert psychiatric opinion, is equivalent to saying that the jury disregarded such opinion. And to say that a jury verdict shall stand and may not be disturbed though it be contrary to expert psychiatric opinion is equivalent to saying that the jury may disregard such opinion. In short, whichever view is taken of the holdings in the two cases, they are incompatible.

This is not a matter of mere semantics. In Holloway, this Court, for fundamental jurisprudential reasons decided that cumulative psychiatric opinion was not a substitute for the moral judgment of the jury; in the instant case, the Court has wholly overturned this concept. In effect, if not in language, the opinion herein overrules Holloway.

3. Nor is this the only departure from the law as established in the Holloway decision. In the case at bar it was held that when the Court stated in Holloway that a jury verdict on the question of sanity could be reversed only if it "shocks the conscience of the court," it had meant but to give graphic expression to the rule generally applicable when a court is asked to set aside a jury verdict for lack of sufficient evidence.^{2/} But in Holloway the Court specifically and in advance disowned such interpretation. For it there held that "Had there been an equivalent conflict of testimony about the actual commission of the offense it might well be that the verdict could not stand. But the issue of criminal responsibility of a defendant suffering from mental disease is not an issue of fact in the same

^{2/} The references to Curley v. United States, 81 U.S. App. D.C. 389, and Cooper v. United States, 94 U.S. App. D.C. 343, further strengthen the impression that in the view of the Court now the test of review of a judgment on the sanity issue is no different than that pertaining to any other.

sense as the commission of the offense." As to that issue, said the Court, following an exhaustive discussion of the reasons for the difference, the jury verdict can be overturned--if at all--only if such verdict shocks the conscience of the Court. To equate the test of review on the sanity issue with that employed with respect to purely factual issues consequently flies in the face of the Holloway language. It is submitted that the Court should decide en banc which of the two tests is to be applied by the District Court and by this Court in future criminal cases in which sanity is in question.

4. The Court holds that the Durham instruction on the test of criminal responsibility is in the future to be supplemented in appropriate cases by a "right-wrong" and an "irresistible impulse" instruction. But Durham relegated the question as to whether the accused knew right from wrong or was acting as he did because of irresistible impulse to the status of mere "symptoms, phases or manifestations" and thus relevant only in an evidentiary sense. It wholly rejected the view that these older doctrines are still proper tests of criminal responsibility. In the opinion, these tests of criminal responsibility were characterized in such terms as "fallacious", "little relation to the truths of mental life", "based on an entirely obsolete and misleading conception of the nature of insanity", resting upon "inadequate, invalid or indeterminable symptom or manifestation", "inadequate" because "based upon one symptom".

To revive tests which this Court has so unequivocally condemned would seem to imply a repudiation of Durham and the decisions which followed it. To transform "right and wrong" and "irresistible impulse" from mere fragments of evidence from which the jury is to make the ultimate determination of criminal responsibility into one more definition of criminal responsibility would be to multiply opportunity for confusion of the jury and to make it difficult in the extreme for the trial judge to select the test or tests appropriate for each particular occasion. To require

everlengthening instructions on the sanity question would be to unduly emphasize it at the expense of others of equal ~~and perhaps greater import~~ to the community and perhaps greater import to the community and perhaps even the defendant.

Durham was intended as to be a step forward, in that one broad and clearly defined insanity test was thereby substituted for several inadequate and scientifically erroneous tests. A requirement that the old tests be revived to stand side by side with the new doctrine, is not consistent with the purposes of Durham, is of significant import, and should be adopted only by the full Court.

5. 24 D.C. Code §301 provides that upon an acquittal by reason of insanity the accused shall ^{3/} be confined in a hospital for the mentally ill. Direction of a verdict of acquittal by reason of insanity therefore violates the right to trial by jury guaranteed to the accused by the Sixth Amendment. For obviously if pursuant to Section 301 the Court directs incarceration in a mental hospital, the accused will have been deprived of his right to go wholly free upon a possible jury verdict of not guilty. The opinion herein has sought to solve the dilemma by permitting the accused to go to the jury on both the issue of guilty and that of criminal responsibility, and then, if the jury finds him guilty, allowing the court to direct a verdict of not guilty by reason of insanity notwithstanding the verdict. But that solution does not solve at least four fundamental problems: (1) must not the accused even at that stage still waive his right to a jury trial before he can be incarcerated in a mental hospital? ^{4/} (2) is he to go free if he does not waive such right? (3) can constitutional rights in that regard be deemed waived by implication? (4) is not such a procedure a violation of Rule 23(a), F. R. Crim. P., and of Patton v. United States, 281 U.S. 276, 299, 312, which require the consent of the Government for any waiver of the right to trial by jury? It is submitted that the opinion herein encroaches upon Sixth Amendment rights and that

^{4/} See note 7 of the opinion.

^{3/} Previously "may" be corrected.

its soundness should be reviewed by the Court sitting en banc.

II

Other Questions of Great Public Importance

1. The instant decision marks the first time in this jurisdiction, -- and so far as appears from the lack of citation in either appellant's brief or in the opinion, in any other jurisdiction -- that a court has overturned a jury verdict on the issue of sanity for lack of sufficient evidence to support it. The conclusions are suggested by that fact: (1) that such a radical departure from established tradition ought not to be accomplished except by the full court; and (2) that there may be good reasons for this lack of precedent for the decision. The first of these inferences is self-explanatory; this section of the motion will be devoted to sketching out what the Government believes to be the reasons for the lack of prior authority for the decision.

Insanity is a defense to crime solely because of the fact that society will not assess legal responsibility where there is no moral responsibility. In the ultimate, therefore, the question of criminal responsibility is neither a legal question nor a factual question in the strictest sense; it is a moral question. Holloway v. United States, supra; REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 100; Durham v. United States, 94 U.S. App. D.C. 228, 242. For that reason, criminal responsibility cannot be measured by the result of scientific analysis or objective judgment; it cannot be measured by the scientific opinion of psychiatrists or by the legal opinion of jurists; the "instinctive sense of justice of ordinary men" is the tribunal which determines whether a man is morally, hence, legally responsible for his criminal acts. And the "institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men." 80 U.S. App. D.C. at 5.

If these be the fundamental philosophical premises which underlie absolution from punishment of a criminal for lack of responsibility, then reversal of a jury decision on this issue by a court could be justified on but one assumption: that the court is better qualified to render a moral judgment than the twelve jurors. Obviously, under our system of government, such an assumption is unthinkable. It is because of this dilemma that courts everywhere have refused to overturn jury verdicts on the sanity question. And the additional reason assigned by the courts (notably by this Court in Holloway) for leaving jury verdicts on the issue undisturbed has been the proposition that judgments with respect to criminal insanity "must be based on the instinctive sense of justice of ordinary men," and that "To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for

what they do."^{5/} It is respectfully submitted that the decision herein, because in conflict with the fundamental principles outlined above is in error, and that a rehearing en banc is indicated.

2. This Court has broad powers in regard to the formulation of tests of criminal responsibility and related subjects. Durham v. United States, supra. In exercising these powers the Court may properly be governed in part by policy considerations which are foreign to it in other fields of law. It is submitted that this Court should rehear the instant case en banc in order to take into account questions having to do with the administration of the criminal law in the District of Columbia which are of serious concern not only to the prosecution but also to the community at large.

The instant decision, as the Government sees it, superimposes these innovations upon the criminal law of the District of Columbia: (a) the jury is no longer restricted to one set of insanity tests but may find the accused not guilty by reason of insanity under any one of three theories or by a combination thereof: that the criminal act was caused by mental disease or defect, that it was the product of irresistible impulse, or that it occurred because the individual did not know the difference between right and wrong; (b) even if the jury finds the accused guilty, the trial court and the appellate courts will scrutinize the record with a view to determining whether in their opinion the jury verdict was arbitrary when viewed in the light of the opinion of psychiatrists; (c) the accused will be entitled to go to the jury on both the issue of innocence and that of lack of guilty by reason of insanity, and if both are decided against him he may then have the issue of sanity once again redetermined by the court; (d) opinion testimony of psychiatrists is conclusive upon the jury, even if contradicted in part by lay testimony, in direct

^{5/} Compare note 1, supra. The present departure from Holloway appears to lend justification to Professor Hall's fear of the "Tyranny of experts," envisaged in his recent article in the American Bar Association Journal, 42 A.B.A.J. 917 (Oct. 1956).

contravention to the universal rule that opinion testimony does not stand on the same footing as testimony as to facts;^{6/} (e) in any case in which the accused proffers psychiatric testimony, the Government will be forced to produce experts of its own in the expectation that defense experts will persuade the appellate tribunals, no matter how discreditable their testimony may appear to the jury.

The Government would be remiss in its duty both to the Court and to the community if it did not express its concern with the cumulative effect of these holdings upon the cause of law enforcement in the District of Columbia.

CONCLUSION

Wherefore, it is respectfully submitted that the instant decision is in error, that it overrules prior law, that it adversely affects the public interest in the administration of justice, and that it requires review by the Court sitting en banc.

/s/ OLIVER GASCH.
OLIVER GASCH,
United States Attorney.

/s/ LEWIS CARROLL
LEWIS CARROLL,
Assistant United States Attorney.

/s/ HAROLD H. GREENE
HAROLD H. GREENE,
Assistant United States Attorney.

CERTIFICATE OF GOOD FAITH

It is hereby certified that the petition is presented in good faith and not for delay.

/s/ HAROLD H. GREENE
HAROLD H. GREENE,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Rehearing En Banc has been mailed to attorney for appellant, Edward Bennett Williams, Esq., 1000 Hill Building, Washington, D.C, this 14th day of November, 1956.

^{6/} See State v. Moore, 42 N.M. 135, 76 P.2d 19, 34.

/s/ HAROLD H. GREENE
HAROLD H. GREENE,
Assistant United States Attorney.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,795 and 12,879

CHARLES W. DOUGLAS

Appellant

United States Court of Appeals

For the
v. *District of Columbia Circuit*

UNITED STATES OF AMERICA

Appellee

MAR 26 1956
Joseph W. Stewart
SUPPLEMENTAL MEMORANDUM

In the Government's brief (pp. 22-23) and on oral argument the contention was made that a person against whom a trial court directs a verdict of not guilty by reason of insanity might well and justifiably raise constitutional and other objections to such a verdict since the effect thereof is to deprive the defendant of his right to outright acquittal by a jury. It is the purpose of this supplemental memorandum to refer to the Court to a case in which the fears expressed by the Government in this regard have already materialized. In Criminal No. 423-55, United States v. Layfield, the Court (Schweinhaut, J.) directed a verdict of not guilty by reason of insanity at the close of the Government's case. As a necessary corollary thereto an order was entered confining the defendant to St. Elizabeth's Hospital for an indefinite period, pursuant to Section 24-301, District of Columbia Code. On the same day the defendant noted an appeal and the case is presently pending in this Court.

Thereafter, on March 6, 1956, a petition for writ of habeas corpus was filed on behalf of the defendant which petition alleged inter alia that the action of the Court in taking the case from the jury and finding him not guilty by reason of insanity was violative of the guarantee of the Sixth Amendment. It is to be assumed that a similar argument will be made in support of the appeal.

It is interesting to note that in the Layfield trial, as in the Douglas case, no express plea of insanity was made. Rather, the trial judge felt that the insanity issue was raised by the Government's evidence itself.

/s/ LEO A. ROVER,
LEO A. ROVER,
United States Attorney.

/s/ LEWIS CARROLL
LEWIS CARROLL,
Assistant United States Attorney.

/s/ HAROLD H. TITUS, JR.
HAROLD H. TITUS, JR.
Assistant United States Attorney.

/s/ HAROLD H. GREENE
HAROLD H. GREENE,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum has been mailed to attorney for appellant, Edward Bennett Williams, Esq., 1000 Hill Building, Washington, D. C., this 15th day of March, 1956.

/s/ HAROLD H. GREENE
HAROLD H. GREENE,
Assistant United States Attorney.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

No. 12,795
No. 12,879

FILED APR 2 1956

Joseph W. Stewart
Appellate CLERK

CHARLES W. DOUGLAS

v.

UNITED STATES OF AMERICA

Appellee

SUPPLEMENTAL MEMORANDUM

On March 15, 1956, the Government requested leave to file a supplemental memorandum in the instant case. In that memorandum the Court's attention was drawn to the then pending petition for writ of habeas corpus of one Layfield who had been indicted for making threats against the President of the United States (18 U.S.C. §871) and who was incarcerated in St. Elizabeth's Hospital following the direction in his criminal case of a judgment of acquittal by reason of insanity. The petition for the writ alleged that Judge Schweinhaut's direction of the judgment deprived the accused of his right to trial by jury; i.e., his right to be found not guilty without incarceration in a mental hospital. It is the primary purpose of the instant memorandum to acquaint the Court with the further history of the Layfield case which appears to bear quite significantly upon the issues in Douglas v. United States.

On March 20, 1956, a hearing was had on the habeas corpus matter before Judge McGarraghy of the District Court. After hearing argument by counsel the court ruled that under the Sixth Amendment Judge Schweinhaut had no authority to direct a verdict of acquittal by reason of insanity and that consequently the confinement of Layfield in St. Elizabeth's Hospital was illegal.

Consequently the writ of habeas corpus issued and Layfield is presently no longer in any kind of confinement.

It would appear that in view of these inconsistent rulings by two judges of the District Court, the net effect of which is to release upon the general public one possibly either criminal or criminally insane and potentially dangerous, it becomes even more important for this Court to seriously weigh the issue raised by the Government in the Douglas case: whether the direction of a judgment of acquittal by reason of insanity does not violate the Sixth Amendment. The Government again most strongly suggests that it does.

II

In this connection the Court is also referred to the well-established rule that waiver of a trial by jury becomes effective only upon the deliberate, intelligent, and understanding consent of the accused, consent of Government counsel, and sanction of the trial court. Patton v. United States, 281 U.S. 276, 299, 312 (1930); Taylor v. United States, 142 F.2d 808 (9th Cir. 1944), cert. denied, 323 U.S. 723; Irvin v. Zerbst, 97 F.2d 257 (5th Cir. 1938), cert. denied, 305 U.S. 597; C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945); Adams ex rel. United States v. McCann, 317 U.S. 269, 277 (1942). Where but one of those factors (e.g., consent by prosecution) is not present, jury trial must be had. C.I.T. Corp. v. United States, supra.

Needless to say, in the instant case there was no deliberate and express waiver of a jury verdict by the accused, there surely was no consent by the Government, and the sanction of the trial court was neither sought nor obtained. In the face of that factual situation a holding that by presenting evidence tending to prove insanity the accused effectively waived his right to outright acquittal by the jury

would be not only to fly in the face of the above cited authorities but also to seriously impair a fundamental Constitutional right.

/s/ LEO A. ROVER
LEO A. ROVER,
United States Attorney.

/s/ LEWIS CARROLL,
LEWIS CARROLL,
Assistant United States Attorney.

/s/ HAROLD H. GREENE
HAROLD H. GREENE,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum has been mailed to attorney for appellant, Edward Bennett Williams, Esq., 1000 Hill Building, Washington, D. C., this 22d day of March, 1956.

/s/ HAROLD H. GREENE
HAROLD H. GREENE,
Assistant United States Attorney.